CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 577

ARTHUR W. MITCHELL, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED NOVEMBER 18, 1940.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 577

ARTHUR W. MITCHELL, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX.

	Original	Print
Record from D. C. U. S., Northern District of Illinois	1	1
Caption (omitted in printing)	1	
Petition	3	1
Excerpts from complaint filed before Interstate Commission	7	2
Excerpts from the answer of the Illinois Central	13	7
Excerpts from the answer of the Rock Island	13	7
Excerpts from the answer of the Pullman Company	14	8
Exhibit "A"—Proposed report of Examiner, Wm. A. Disque	16	10
Exhibit "B"—Report of Commission	26	18
Order of Commission dismisssing the complaint	44	33
Exhibit "C"—Order of Commission denying petition for rehearing and reargument	45	34
Summons and return (omitted in printing)	55	
Answer of defendant, United States of America	58	41
Intervention and answer of Interstate Commerce Commission	61	42

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 11, 1941.

—1948

	Original	Print
Record from D. C. U. S., Northern District of Illinois—Continued		
Answer of defendants, Frank O. Lowden, et al., Trustees of Chicago, Rock Island & Pacific Railway Co.	66	44
Answer of defendant, The Pullman Company	70	46
Answer of defendant, Illinois Central Railroad Co.	78	50
Order setting cause for hearing before three-judge court	82	52
Findings of fact and conclusions of law	84	52
Order dismissing cause for lack of jurisdiction	86	53
Notice of appeal	88	53
Petition for appeal	90	55
Assignment of errors	91	55
Order granting appeal	98	61
Citation and service thereof (omitted in printing)	100	
Appeal bond (omitted in printing)	103	
Order approving appeal bond	107	62
Order extending time to docket appeal to November 21, 1940	130	63
Order granting leave to use original exhibits	132	63
Order re transcript of testimony had on May 27, 1940, before District Court	134	64
Appellant's praecipe and proof of service	136	64
Plaintiff's Exhibit No. 1—Proceedings before Interstate Commerce Commission, Docket No. 27844	139	65
Complaint (copy) (omitted in printing)	140	
Transcript of notes of hearing	150	66
Caption and appearances	150	66
Proceedings	153	67
Testimony of Arthur W. Mitchell	157	70
Thomas J. Price	200	97
Edward H. Carry	209	103
William Harrison	220	109
John J. Pullen	228	115
Elias A. Morris	238	121
Albert W. Jones	248	128
W. S. Scott	331	180
A. C. McGuire	346	189
Arthur W. Mitchell (recalled)	366	201
Exhibit No. 1—Railroad ticket	369	204
Exhibit No. 2—Pullman stub	370	204
Exhibit No. 3—Time table—Illinois Central	371	205
Exhibit No. 4—Time table—Rock Island	406	207
Exhibit No. 5—Arkansas separate coach law	442	211
Proposed report of examiner (copy) (omitted in printing)	445	
Report and order of Commission (copy) (omitted in printing)	454	
Order denying petition for rehearing and reargument (copy) (omitted in printing)	465	
Defendants' Exhibit No. 1—Reply of Frank O. Lowden, et al., Trustees of Chicago, Rock Island & Pacific Railway Co., filed June 4, 1938, before Interstate Commerce Commission	466	214

	Original	Print
Record from D. C. U. S., Northern District of Illinois—Continued		
Statement of evidence	478	220
Caption and appearances	479	220
Plaintiff's evidence	481	221
Defendants' evidence	483	222
Argument by Mr. Mitchell	483	222
Argument by Mr. Westbrooks	500	230
Argument by Mr. Payne	511	235
Argument by Mr. Hughes	538	248
Defendants' praecipe for transcript of record	559	258
Defendants' Exhibit No. 2—Exceptions on behalf of plaintiff to report of examiner, filed May 26, 1938, before Interstate Commerce Commission	562	259
Clerk's certificate (omitted in printing)	598	
Statement of points to be relied upon and designation of parts of record to be printed	599	279

BLANK PAGE

[fols. 1-5]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 500

ARTHUR W. MITCHELL, Plaintiff,

vs.

UNITED STATES OF AMERICA, FRANK O. LOWDEN, JAMES E. GORMAN, and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation; and Pullman Company, a corporation, Defendants

PETITION—Filed April 20, 1939

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Your petitioner, Arthur W. Mitchell, the plaintiff herein, presents this his petition against the United States of America, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees of the estate of the Chicago, Rock Island & Pacific Railway Company, a corporation, Illinois Central Railway Company, a corporation and Pullman Company, a corporation and thereupon petitioner respectfully states:

[fol. 6] I

That he is now and was at the time of the grievances, injuries and damages to him sustained by the acts, as hereinafter alleged, of certain of the defendants, a native born citizen of the United States of America, a resident of Chicago, County of Cook and State of Illinois; is a duly licensed and practicing attorney-at-law, and is now and was a Representative in Congress of the First Congressional District of the said State of Illinois.

II

The defendants and each of them, excepting the United States of America, are duly organized and incorporated,

severally, as railroad and transportation corporations under the laws of the State of Illinois, with principal operating offices at Chicago, Illinois, and within the jurisdiction of this Honorable Court.

III

Each of the defendant corporations, mentioned in Paragraph II hereof, is a common carrier engaged in the transportation of persons and property by railroad, in interstate commerce, between points inter alia, in the States of Illinois, Tennessee and Arkansas as well as points in various other states of the United States and as such common carriers were so engaged at the time of the grievances hereinafter stated as having been suffered by the plaintiff from the acts of the said defendants; that at the time of the said grievances last mentioned and for many years prior thereto as well as subsequently thereafter, continuously to the present time, the said defendants were engaged in interstate commerce and are subject to the provisions of the Interstate Commerce Act and its supplements.

[fol. 7]

IV

The within suit is brought to set aside and annul an order of the Interstate Commerce Commission, other than for the payment of money, pursuant to the provisions of the Act of February 4, 1887, and all amendments and supplements thereto, known as the Interstate Commerce Act, the laws of the United States designated as the Judicial Code and Judiciary and under the general equity jurisdiction of this court.

V

Defendant, United States of America, is made a party defendant to this suit as directed by the Congress of the United States (28 U. S. C. A. Sec. 41, subsection 28; secs. 43-48.)

VI

The facts and circumstances leading to the order of the Interstate Commerce Commission herein sought to be set aside and annulled, are as follows:

On or about, to-wit: September 2, 1937 the plaintiff duly filed his written complaint with the Interstate Commerce

Commission charging the defendant corporations with the doing of certain acts as alleged in the said complaint, which said acts the plaintiff charged, were in violation of the Interstate Commerce Act and the Fourteenth Amendment of the United States Constitution.

The complaint filed by the plaintiff was duly verified and in substance is as follows:

II

"That the defendants, and each of them, are common carriers engaged in the transportation of passengers and [fol. 8] property, wholly by railroad, between Chicago, Illinois; and points in the State of Arkansas, particularly the city of Hot Springs, Arkansas; as well as points in various other states of the United States, including the State of Tennessee; and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III

That the defendants, and each of them, in violation of Section 1 of the Interstate Commerce Act, Clause 5 thereof, on April 20, 1937, did make and receive a charge for services rendered and to be rendered in connection with the transportation of the complainant from Chicago, Illinois, to Hot Springs, Arkansas, which was unjust, unreasonable and unlawful; in this, that complainant on said April 20, 1937, did purchase in Chicago, Illinois, a first-class round-trip ticket to and from Hot Springs, Arkansas, over the defendant lines, and did pay therefor the rates demanded and received of first class passengers for first class accommodations; yet defendants failed to furnish complainant first class accommodations and instead thereof, furnished him with second class accommodations over his protest; which said action of the defendants in charging for and receiving the fare for first class accommodations and failing to provide same; providing in lieu thereof, second class accommodations, was unjust, unreasonable and unlawful, in violation of Section 1, Clause 5, of the Interstate Commerce Act.

IV

That the defendants, and each of them, in violation of Section 2 of the Interstate Commerce Act, on the date afore-

said, did directly and indirectly charge, demand, collect, and receive from this complainant a greater compensation for service rendered in transporting him as a passenger, than was charged, demanded, collected and received from other persons (whose names are to complainant unknown) for do- [fol. 9] ing for them a like and contemporaneous service, and did thereby unjustly discriminate against complainant; in this, that the defendants did charge this complainant and received from him the price of first class accommodations; yet furnished to him second class accommodations, while furnishing first class accommodations to all others who had purchased first class tickets for first class accommodations; and such action of the defendants did thereby unjustly discriminate against complainant in violation of Section 2 of the Interstate Commerce Act.

V

That the defendants, and each of them, in violation of Section 3, Clause 1 of the Interstate Commerce Act, on the date aforesaid, did give undue and unreasonable preference and advantage to certain white persons (whose names are to this complainant unknown) in respect to transporting them from Chicago to Hot Springs aforesaid; and did subject this complainant to undue and unreasonable prejudice and disadvantage in respect to transporting him as aforesaid; in this, that the aforesaid white persons holding first class tickets similar identically to the first class ticket held by this complainant, were transported in a first class car, said car being equipped with clean towels, clean washbowls, comfortable seats with upholstered backs and foot rests; clean smoking rooms, lounging rooms, observation space, writing desks; writing paper, pen and ink, magazines and other reading periodicals, regular and efficient porter service, pressing and shoe shining service, stenographic service, manicuring and barber shop service, bath service, valet service, radio, soap of high quality, facilities for serving meals in the car or the option of having meals in the dining car; clean toilet facilities with running hot and cold water, and water for flushing purposes with disinfectant, all free of charge to first class passengers, and many other services too numerous to mention or to particularize more definitely; while this complainant, notwithstanding the fact that he possessed a first class ticket entitling him to ride in a first

[fol. 10] class car possessing each and every one of the last named facilities, was compelled by the defendants by and through their agents, servants, and employees and over protest of this complainant, to ride in a second class car which possessed none of the aforementioned facilities but on the contrary said second class car did not contain clean towels, nor clean washbowls; nor compartments, berths, sections, drawingrooms, smoking rooms, lounging rooms, observation space, writing desks, paper, pen, ink, magazines, and other reading periodicals; nor porter service, soap, nor facilities for meals being served in said car; nor clean toilet facilities with running hot and cold water for flushing purposes and disinfectant; and this complainant specifically charges that the second class car in which he was forced to ride as aforesaid did not contain the above facilities and did not contain any one or either of them; but on the contrary the said second class car was filthy with filthy toilets, and so remained during the entire time this complainant was compelled to occupy it, which was for a period of more than four hours and over a journey of about 160 miles; beginning at a point just west of Memphis, Tennessee, and continuing on into Hot Springs, Arkansas.

And in this connection, complainant further states that the first class car occupied by the aforesaid white persons holding tickets identically similar to the first class ticket held by this complainant was large, comfortable, free from stench and odors, well ventilated, lighted, and air-conditioned; and always clean and sanitary; while the second class car which this complainant was forced to complete his journey in as outlined in the preceding paragraph, was divided by partitions and used jointly for carrying baggage, train crew, and passengers; that said car was small, poorly ventilated, filthy, filled with stench and odors emitting from the toilet, and otherwise filthy and indescribably unsanitary.

That said action of defendants in furnishing accommodations to the aforesaid white persons holding first class [fol. 11] tickets which were far superior to the accommodations furnished to this complainant on his first class ticket, was unduly and unreasonably prejudicial to him, and was unduly and unreasonably preferential to said white persons to the disadvantage of this complainant, in violation of Section 3, Clause 1, aforesaid.

VI

That the defendants, claiming to act under authority of the Arkansas Statute (Kirby's Arkansas Statute, Sections 6622 to 6632), did force and compel this complainant to ride in a second class car, notwithstanding the fact that complainant held a first class ticket; that the second class car was the car described in Paragraph Five hereof which by reference is made a part of this paragraph. That the action of defendants was based on the fact that this complainant is a Colored person, and in transporting him in the second class car referred to, while white persons holding identically similar first class tickets were permitted to ride in the first class car described in Paragraph Five of this complaint, which by reference is made a part hereof, and said practice of the defendants in furnishing such unequal accommodations to persons holding similar first class tickets, under the aforesaid Statute, causes undue and unreasonable advantage and preference to white persons; and causes undue and unreasonable prejudice to this complainant and all other Colored persons who in the future will use, as interstate passengers, the lines of the said defendants.

The said unreasonable and undue advantage and preference to white persons aforesaid; and undue and unreasonable prejudice to this complainant and all other Colored persons who in the future will use defendant lines, only arises between persons in intrastate commerce on the one hand and persons in interstate commerce on the other hand, in this, that said practice under said law only arises after Colored persons have entered the State of Arkansas and did not exist while this complainant was traveling in Illinois; [fol. 12] that said law is not intended to and does not operate beyond the territorial boundaries of said State.

That said action, causing undue and unreasonable advantage to white persons, and causing undue and unreasonable prejudice to this complainant, being based on the State law aforesaid, is in violation of Section 13, Clause 4, of the Interstate Commerce Act.

VII

That by reason of the facts stated in the foregoing paragraph complainant has been subjected to the payment of fares for transportation which were when exacted and still are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act; and said complainant has been

unjustly discriminated against in violation of Section 2 of the Interstate Commerce Act; that said defendants have been unduly and unreasonably preferential to some persons while at the same time being unduly and unreasonably prejudiced against this complainant in violation of Section 3 of the Interstate Commerce Act; that the action of defendants in operating under the Arkansas Law causes undue and unreasonable preference to some persons and undue and unreasonable prejudice to complainant and other persons, in violation of Section 13 of the Interstate Commerce Act, and the Fourteenth Amendment of the United States Constitution in denying to petitioner equal protection of the laws.

Wherefore, complainant prays that defendants and each of them may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of persons between the origin and destination points named in paragraphs V and VI hereof, in lieu of the services and facilities named in said paragraphs V and VI, and such other services and facilities as the Commission may [fol. 13] deem reasonable and just; and that such other and further order or orders be made as the Commission may consider proper in the premises."

VII

The defendant, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, trustees of the estate of the Chicago, Rock Island and Pacific Railroad Company, a corporation and hereinafter called and referred to as the "Rock Island," filed an answer to the complaint above set forth, (1) it admits that it was a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce on April 20, 1937, (2) it denies that the facts charged in Paragraph III of the complaint were unjust, unreasonable or unlawful and in violation of Section 1, Clause 5 of the Interstate Commerce Act; (3) it denies the charges contained in Paragraph IV of the complaint and further denies said acts contained in the said paragraph violated Section 2 of the Interstate Commerce Act; (4) it denies each and every allegation contained in Paragraphs V-VI of the complaint and denies that the acts charged in said para-

graphs violated Section 3, Clause 1 or Section 13, Clause 4 of the Interstate Commerce Act; (5) it denies the allegations of Paragraph VII of the complaint and further denies that the acts charged in said paragraph violated Sections 1, 2, 3, and 13 of the Interstate Commerce Act and the Fourteenth Amendment of the United States Constitution and prayed to be dismissed.

VIII

The defendant, Illinois Central Railroad Company, hereinafter referred to as the Illinois Central by and in its [fol. 14] answer filed to the above mentioned complaint, (1) denies that it owned or operated any line of railroad within the State of Arkansas; (2) it denies each and every allegation of Paragraphs III, IV, V, VI and the first paragraph of Paragraph VII of the complaint; (3) it further denies that the acts or omissions towards the complaint violated Sections 1 (5), 2, ? (1) or 13 (4) of the Interstate Commerce Act and prayed that the complaint be dismissed as to it.

IX

The defendant, the Pullman Company, filed its answer to the above mentioned complaint, by and in its answer, (1) it admits the allegations of Paragraph I of the complaint; (2) it denies the allegations of Paragraph II of the complaint in so far as it pertains to this defendant and states that it is a Sleeping Car Company, subject to the provisions of the Interstate Commerce Act, and furnishes sleeping car accommodations to passengers traveling between the points stated in Paragraph II of the complaint, when such passenger- contract with it for such accommodations in accordance with the provisions of its tariffs on file with the Interstate Commerce Commission; (3) it denies the allegations of Paragraph 3 of the complaint as applying to it and states that it furnished equal accommodations to the plaintiff, for which the plaintiff had paid and that it had no contract with the plaintiff for accommodations between Memphis, Tennessee and Hot Springs, Arkansas; (4) it denies the allegations of Paragraph IV of the complaint and refers to Paragraph II of its answer concerning the sleeping car accommodations; (5) it likewise denies the allegations of Paragraph V of the complaint and states that it

did not own or control the inferior accommodations in the equipment which the plaintiff was compelled to occupy between Memphis and Hot Springs, and (6) it likewise denies [fol. 15] the allegations of Paragraphs VI and VII of the complaint as relating to the plaintiff and prays the dismissal of the complaint as to it.

X

The said complaint was assigned for hearing by the commission by order dated December 4, 1937, of which due notice was given to all parties.

XI

A formal hearing of the complaint was heard before the commission represented by W. A. Disque, examiner, on March 7, 1938.

XII

That on said last mentioned date, evidence, both oral and documentary, was introduced by the plaintiff and the defendant, Rock Island. A complete transcript of the evidence had and taken before the commission as aforesaid, is hereby made a part of this petition, by reference thereto, as though fully set out herein and will be offered on behalf of the plaintiff on the hearing of this petition.

XIII

Thereafter, briefs were filed by the plaintiff and by the defendants, and in due course the examiner's proposed report was filed, recommending that the complaint should be dismissed, which said proposed report is hereto attached and marked Exhibit "A" and made a part hereof, and is as follows:

[fol. 16] EXHIBIT "A"

"INTERSTATE COMMERCE COMMISSION

No. 27844

ARTHUR W. MITCHELL

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Trustees, et al.

Submitted ——. Decided May 5th, 1938

Present accommodations for colored passengers traveling in Arkansas over the line of The Chicago, Rock Island and Pacific Railway Company on through journeys from Chicago, Ill., to Hot Springs, Ark., found not unjustly discriminatory or unduly prejudicial. Complaint dismissed.

Arthur W. Mitchell and Richard E. Westbrooks for complainant.

Wallace T. Hughes, Daniel Taylor, E. A. Smith, Robert Mitten, H. J. Deany, Erwin W. Roemer, Charles S. Williston, and Lowell M. Greenlaw for defendants.

Report Proposed by Wm. A. Disque, Examiner

Complainant, a negro resident of Chicago, Ill., and a member of the House of Representatives of the United States, by complaint filed September 2, 1937, alleges, in effect, that defendants, in connection with their purported compliance with an Arkansas statute requiring segregation of the races during transportation, do not provide as desirable accommodations for colored as for white passengers traveling in [fol. 17] Arkansas over the line of The Chicago, Rock Island and Pacific Railway Company at first-class fares from Chicago, Ill., to Hot Springs, Ark., and that this results in unreasonable charges and unjust discrimination against, and undue prejudice to, colored passengers, in violation of sections 1, 2, 3, and 13 of the Interstate Commerce Act, and the Fourteenth Amendment to the Constitution of the United States. However, the only relief sought is removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations. The above-

named carrier will be hereinafter called the Rock Island. It is the principal defendant.

Docket No. 27844—Sheet 2

Defendants question our jurisdiction to give the relief, on the ground that the sections of the act invoked relate only to rates and charges. They take the position that the only provisions which give this Commission power over the furnishing of equipment and facilities of transportation begin with section 1 (10), which says that the term 'car service' as used in those provisions 'shall include the use, control, supply, movement, * * * and return of * * * cars * * * used in the transportation of property * * *.' (Italics ours.) However section 3 (1) makes it unlawful 'to subject any particular person * * *, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' In view of the conclusion reached the question raised is not important, but it appears to be set at rest by Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, and Pennsylvania R. Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456, where the Supreme Court held that this Commission had jurisdiction to deal with discrimination in the distribution of coal cars.

The complaint mentions but a single incident of alleged discrimination and prejudice, the one hereinafter described [fol. 18] in which complainant was involved. Although there is an allegation that 'said practice of the defendants in furnishing such unequal accommodations * * * causes * * * undue and unreasonable prejudice to this complainant and all other colored persons who in the future will use * * * the lines of said defendants', defendants upon brief urge that the complaint is sufficient to raise any issue as to practice, on the ground that one incident does not amount to a practice, and move that all testimony that does not relate to this particular incident be stricken. Plainly, however, the incident was mentioned as representative of an alleged practice that was expected to continue. The prayer is that an order be entered requiring defendants to cease and desist

Docket No. 27844—Sheet 3

from the alleged violations of the act and provide lawful accommodations in the future for colored passengers from and

to the points involved. Defendants are taking an unduly technical position. They have long understood that a complaint is not to be narrowly construed. They were well aware of the kind of accommodations they were furnishing and were not taken by surprise, but came to the hearing with a full array of witnesses adequately informed respecting all the facts. They objected at the hearing to the receipt of any testimony not confined to the incident mentioned, but their objections were overruled by the examiner.

At the hearing complainant moved that the Rock Island's answer be stricken, contending that it violated Rule IV, (d), (e) of the Rules of Practice, because it did not state fully, completely and with particularity the nature and grounds of the defense. Paragraph (e) of the rule deals specifically with answers to allegations under sections 2 and 3 of the act. However, there is no indication that complainant was put to any material disadvantage by defendant's failure and the matter may be passed, as it calls only for a reprimand. [fol. 19] The case is built mainly on an unpleasant experience complainant had a little over a year ago. On the evening of April 20, 1937, he left Chicago for Hot Springs, over the lines of the Illinois Central Railroad Company to Memphis, Tenn., and the Rock Island beyond, traveling on a first-class round-trip ticket he had purchased from the initial carrier's ticket agent in Chicago. He had requested a bedroom on defendants' through Chicago-Hot Springs Pullman sleeping car, but none being available, the ticket agent provided him with a compartment as far as Memphis in the sleeper destined to New Orleans, La. Just before the train reached Memphis, on the morning after leaving Chicago, he had a Pullman porter transfer him, to-

gether with his hand baggage and other personal effects, to the Chicago-Hot Springs sleeper then on the same train, but which was to leave Memphis at 8:30 a.m., on Rock Island train no. 45, and reach Hot Springs, 193 miles west, at 1:05 p.m., the same day. Plenty of space was available and the porter assigned him a particular seat in that car, for which he was to pay the established fare, 90 cents. Shortly after leaving Memphis and crossing the Mississippi River into Arkansas the train conductor took up the Memphis-Hot Springs portion of his ticket, but refused to ac-

cept payment for the Pullman seat from Memphis, and in accordance with custom, compelled him, over his protest and finally under threat of arrest, to move into the so-called Jim Crow car, or colored coach, in compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or sections thereof providing 'equal, but separate and sufficient accommodations,' for both races. Complainant's baggage and other personal effects were allowed to go on to destination in the Pullman car. Later, the conductor returned the portion of the ticket he had taken up and correctly advised complainant that he could get a refund on the basis of the second-class fare [fol. 20] from Memphis, which was one cent less per mile than the first class fare. The refund was never claimed from defendants and is not here sought, but defendants stand ready to make it upon application. Complainant has an action at law pending against the defendants in the Circuit Court of Cook County, Ill., for damages incident to his transfer.

The Pullman car contained 10 sections of berths and two compartment-drawing rooms. The use of one of the drawing rooms would have amounted to segregation under the State law and ordinarily such accommodations are available. Whether the 90-cent seat fare would have been applicable is not clear, but both drawing rooms were occupied

by white passengers. The car was of modern design and had all the usual facilities and conveniences found in standard sleeping cars. It contained a smoking room for men and a dressing room for women. It was air conditioned, had hot and cold running water, tables, carpet, mirrors, wash basins with good soap, clean linen towels, and separate flushable toilets for men and women. It was in excellent condition throughout. First-class white passengers had, in addition to the Pullman sleeper, the exclusive use of the train's only dining car and only observation-parlor car, the latter having somewhat the same accommodations for day use as the Pullman car and, in addition, a writing desk and perhaps a radio. The white passengers could range throughout the portion of the train behind the colored coach, but colored passengers were confined to that car.

The colored coach, carried next to the baggage car, was the first passenger car behind the locomotive. Behind it came a white day coach, the dining car, the sleeper and finally the observation-parlor car, all being Rock Island equipment, except the sleeper. The colored coach, though of standard size and steel construction; was an old com- [fol. 21] bination affair. It was divided by partitions into three main parts, one for colored smokers, one for white smokers, and one, in the middle, for colored men and women, but primarily the latter, and known as the women's section, each section having seats for about 20 passengers. Complainant sat in the women's section. The car was poorly ventilated and not air conditioned. The upholstery was of leather. There was a toilet in each section, but only the one in the women's section was equipped for flushing and it was for the exclusive use of the colored women. The car was without wash basins, soap, towels or running water, except in the women's section. According to complainant the car was filthy and foul smelling, but the testimony of defendants, as we shall later see, is to

the contrary. The car contained, besides complainant, several other colored passengers, including women. Two pairs of seats in the colored men's section were used as an office by the conductor and the flagman, who were white. These conditions had prevailed for at least 25 years.

The above facts are gathered principally from complainant's testimony, but several other colored persons, who had traveled from Memphis to Hot Springs over the Rock Island at times during the above-mentioned period, gave similar testimony as to the condition of the cars in which they rode. They also told of colored coaches between these points that had common toilets for men and women and of the absence of carpets and foot rests, while much more desirable accommodations were provided for white passengers traveling in coaches. This treatment of the colored race cannot be too strongly condemned.

Defendant's witnesses, namely the conductor and flagman of the train and the superintendent who had charge of getting the equipment ready at Memphis, testified that they noticed no dirt, filth or obnoxious odors in the car; that it was as clean as it could be made; that in accord-

[fol. 22] ance with the usual practice it was thoroughly cleaned, disinfected, equipped with newly laundered seat and seat-back linen covers, and inspected at Memphis before it was put into the train. Each section of the car contained a cooler of ice water and a 12-inch electric fan. Incidentally, the Rock Island keeps eight men busy preparing equipment for 13 or 14 trains per day.

Since the early part of July, 1937, the Rock Island has been running a colored coach between Memphis and Hot Springs that is entirely modern. It is of all-steel construction, with six-wheel trucks. It is divided by a partition into two sections, one for colored and the other for white passengers. It has comfortable seats with plush upholstery

and linen seat covers, linoleum floor covering, air conditioning, electric light, and electric fans. In each section there are wash basins, running hot and cold water, free paper towels and drinking cups, and separate flush toilets for men and women. There is no smoker section, as smoking nowadays is generally permitted in all coaches and sections thereof, and even in some instances, or to some extent, in Pullman cars. The present colored coach is as fully desirable in all its appointments as the coach used by the white passengers traveling at second-class fares. One of the complainant's witnesses testified that as late as September, 1937, he found conditions in the colored coach between Memphis and Hot Springs 'very bad,' but evidently he was not riding the train that carried the new car, as he said the men and women used the same toilet.

The present colored coach takes care of colored second-class passengers, but there is no Pullman, dining or observation-parlor car for colored first-class passengers. Only about one negro to 20 white passengers rides this train from and to points on the line between Memphis and Hot Springs and there is hardly ever a demand from [fol. 23] a colored passenger for Pullman accommodations; the conductor recalled but 10 or 12 in the past 32 years of his service on the train. What demand there may have been at ticket offices does not appear.

Various previous proceedings akin to this one are Council v. Western & A. R. Co., 1 I.C.C. 339; 1 I.C.R. 638; Heard v. Georgia R. Co., 1 I.C.C 428; 1 I.C.R. 719; Edwards v.

Nashville C. & St. L. Ry. Co., 12 I.C.C. 247, and Crosby v. St. Louis-S. F. Ry. Co., 112 I.C.C. 239. In the first four proceedings affirmative findings and orders were entered requiring the removal of unjust discrimination and undue prejudice to colored passengers, but not in the last one. Each rested on its own facts. None presented the same situation as the instant proceeding.

Docket No. 27844—Sheet 8

For the purposes of this proceeding complainant accepts segregation under the Arkansas statute, but urges that defendants, to remove and avoid unjust discrimination and undue prejudice, are bound to provide the same equipment and accommodations for colored passengers as for white passengers. In other words, he says that if defendants are to continue the Pullman sleeper, the dining car and the observation-parlor car for white passengers, they must provide similar facilities, three extra cars, for colored passengers paying first-class fares plus the additional charges provided by tariff for seat space.

Complainant urges that collection of the first-class fare, notwithstanding the fact that second-class accommodations were furnished him, was violative of sections 1, 2, 3 and 6 of the Interstate Commerce Act; also of the Fourteenth Amendment to the Constitution, on the ground that he was deprived of money without due process of law and denied equal protection of the laws. It is sufficient to say that a first-class ticket was furnished and charged for because complainant wanted it, and that after it developed that the first-class accommodations west of Memphis were all [fol. 24] taken by other passengers defendants offered to refund the difference. Moreover, as already stated, complainant is here seeking no relief from the charges paid.

Complainant urges that the Rock Island, having received from him the first-class fare but having failed to furnish first-class accommodations west of Memphis, violated section 13 (4) of the act. That provision relates to intrastate fares that are unjustly discriminatory or unduly prejudicial in their relation to interstate fares. No intrastate fares are here involved. There was no break in complainant's journey at the Tennessee-Arkansas State line. He was engaged in through interstate travel from Chicago to Hot Springs. Moreover, as said in the next preceding para-

graph, complainant was furnished a first-class ticket because he asked for it, and refund awaits him.

Regardless of what finding may be made respecting the Rock Island, the Illinois Central asks that the complaint be dismissed as to it. There is no showing that colored passengers are treated differently from white passengers on their journeys from Chicago to Memphis and apparently that road is in no way chargeable with discrimination, even though it participates in the through transportation under joint fares and other arrangements. This carrier is a proper, but perhaps not necessary party. It was named as a defendant apparently out of abundance of caution, because it participated in the movement.

The Pullman Company also asks dismissal, regardless of what may be done as to the Rock Island, contending that it is not chargeable with discrimination because it provides accommodations in the form of drawing rooms, which if not already occupied or reserved for some one else, are available for colored passengers west of Memphis. Apparently there is no discrimination on its part, if the 90-cent seat fare is applicable.

[fol. 25] The present colored coach meets the requirements of the law. As there is comparatively little colored traffic and not likely to be such demand for Pullman, dining and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars, the discrimination and prejudice is plainly not unjust or undue. Only differences in treatment that are unjust or undue are unlawful and within the power of this Commission to condemn, remove and prevent.

The complaint should be dismissed."

XIV

The plaintiff on or about May 25, 1938, duly filed exceptions to the said proposed report, in which exceptions, among other things the plaintiff contended that his constitutional rights under the 14th Amendment of the United States — had been violated.

XV

The defendant, Rock Island filed a reply to the exceptions, on or about June 4, 1938.

XVI

On or about July 6, 1938, the cause came on before the full Commission for oral argument.

XVII

On or about November 7, 1938, the Commission filed its report and order thereon dismissing the complaint. The said report was dissented to by five members of the said Commission.

[fol. 26]

XVIII

The said report, including the dissenting expressions and the order of the Commission are hereto attached and marked Exhibit B and made a part hereof and is as follows:

EXHIBIT "B"

Interstate Commerce Commission

Recd. 11/28/38

No. 27844

ARTHUR W. MITCHELL

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al.

Submitted July 6, 1938. Decided November 7, 1938

Present accommodations for colored passengers traveling in Arkansas over the line of The Chicago, Rock Island and Pacific Railway Company on through journeys from Chicago, Ill., to Hot Springs, Ark., found not unjustly discriminatory or unduly prejudicial. Complaint dismissed.

Arthur W. Mitchell and Richard E. Westbrooks for complainant.

Wallace T. Hughes, Daniel Taylor, E. A. Smith, Robert Mitten, H. J. Deany, Erwin W. Roemer, Charles S. Williston, and Lowell M. Greenlaw for defendants.

[fol. 27] Report of the Commission

By the Commission:

Exceptions to the examiner's report were filed by complainant, to which the trustees of The Chicago, Rock Island and Pacific Railway Company, hereinafter called the Rock Island, replied. The proceeding was orally argued.

Complainant, a negro resident of Chicago, Ill., and a member of the House of Representatives of the United States, by complaint filed September 2, 1937, alleges, in effect, that defendants, in connection with their purported compliance with an Arkansas statute requiring segregation of the races during transportation, do not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over the line of the Rock Island at first-class fares from Chicago, Ill., to Hot Springs, Ark., and that this results in unreasonable charges and unjust discrimination against, and undue prejudice to, colored passengers, in violation of sections 1, 2, 3, and 13 of the Interstate Comm. ce Act, and the fourteenth amendment to the Constitution of the United States, guarantee-

Docket No. 27844—Sheet 2

ing due process of law and equal protection of the laws. However, the only relief sought is removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations.

Defendants question our jurisdiction to give the relief sought, on the ground that the sections of the act invoked relate only to rates and charges. They take the position that the only provisions which give this Commission power over the furnishing of equipment and facilities of transportation begin with section 1 (10), which says that the term "car service" as used in those provisions "shall include the use, control, supply, movement, * * * and return [fol. 28] of * * * cars * * * used in the transportation of *property* * * *." (Italics ours.) However section 3 (1) makes it unlawful "to subject any particular person * * *, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." In view of the conclusion reached the question raised is not important, but it appears to be set at rest by Interstate Commerce Commission v. Illinois Cen-

tral R. Co., 215 U. S. 452, and Pennsylvania R. Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456.

The complaint mentions but a single incident of alleged discrimination and prejudice, the one hereinafter described in which complainant was involved. Although there is an allegation that "said practice of the defendants in furnishing such unequal accommodations * * * causes * * * undue and unreasonable prejudice to this complainant and all other colored persons who in the future will

Docket No. 27844—Sheet 3

use * * * the lines of said defendants," defendants upon brief urge that the complaint is insufficient to raise any issue as to practice, on the ground that one incident does not amount to a practice, and they move that all testimony that does not relate to this particular incident be stricken. Plainly, however, the incident was mentioned as representative of an alleged practice that was expected to continue. The prayer is that we require defendants to cease and desist from the alleged violations of the act and to provide lawful accommodations in the future for colored passengers from and to the points involved. Defendants are taking an unduly technical position. They have long understood that a complaint is not to be narrowly construed. They were well aware of the kind of accommodations they were furnishing and were not taken by surprise, but came to the hearing with witnesses adequately informed respecting all the facts. They objected at the hearing to the receipt of any testimony not confined to [fol. 29] the incident mentioned, but their objections were properly overruled by the examiner.

At the hearing, complainant moved that the Rock Island's answer be stricken, contending that it violated rule IV (d), (e) of the Rules of Practice, because it did not state fully, completely, and with particularity the nature and grounds of the defense nor deny specifically and in detail each material allegation of the complaint. However, there is no indication that complainant was put to any material disadvantage by defendant's failure; and striking the answer would avail nothing, for the proceeding would nevertheless be at issue. Rule IV (b) and Smokeless Fuel Co. v. Norfolk & W. Ry. Co., 85 I.C.C. 395.

Docket No. 27844—Sheet 4

The case is built mainly on an unpleasant experience complainant had about 18 months ago. On the evening of April 20, 1937, he left Chicago for Hot Springs, over the lines of the Illinois Central Railroad Company to Memphis, Tenn., and the Rock Island beyond, traveling on a round-trip ticket he had purchased at 3 cents per mile from the initial carrier's ticket agent in Chicago. He had requested a bedroom on defendants' through Chicago-Hot Springs Pullman sleeping car, but none being available, the ticket agent provided him with a compartment as far as Memphis in the sleeper destined to New Orleans, La. Just before the train reached Memphis, on the morning after leaving Chicago, he had a Pullman porter transfer him, together with his hand baggage and other personal effects, to the Chicago-Hot Springs sleeper then on the same train, but which was to leave Memphis at 8:30 a.m., on Rock Island train no. 45, and reach Hot Springs, 193 miles west, at 1:05 p.m., the same day. Space was available and the porter assigned him a particular seat in that car, for which he was to pay the established fare, 90 cents. Shortly after leaving Memphis and crossing the Mississippi [fol. 30] River into Arkansas the train conductor took up the Memphis-Hot Springs portion of his ticket, but refused to accept payment for the Pullman seat from Memphis, and in accordance with custom, compelled him, over his protest and finally under threat of arrest, to move into the car provided for colored passengers, in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections thereof providing "equal, but separate and sufficient accommodations", for both races. Complainant's baggage and other personal effects were allowed to go

Docket No. 27844—Sheet 5

on to destination in the Pullman car. Later the conductor returned the portion of the ticket he had taken up and correctly advised complainant that he could get a refund on the basis of the coach fare of 2 cents per mile from Memphis. The refund was never claimed from defendants and is not here sought, but defendants stand ready to make it upon application. Complainant has an action at

law pending against defendants in the Circuit Court of Cook County, Ill., for damages incident to this transfer.

The Pullman car contained 10 sections of berths and 2 compartment-drawing rooms. The use of one of the drawing rooms would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent seat fare being applicable. Occasionally they are used by colored passengers, but in this instance both drawing rooms were already occupied by white passengers. The car was of modern design and had all the usual facilities and conveniences found in standard sleeping cars. It contained a smoking room for men and a dressing room for women. It was air conditioned, had hot and cold running water, tables, carpet, mirrors, wash basins with good soap, clean linen towels, and separate flushable toilets for men and women. It was in excellent condition throughout. First- [fol. 31] class white passengers had, in addition to the Pullman sleeper, the exclusive use of the train's only dining car and only observation-parlor car, the latter having somewhat the same accommodations for day use as the Pullman car and, in addition, a writing desk and perhaps a radio.

The coach for colored passengers was in the rear of the baggage car. Behind it were a day coach for white passengers, the dining car, the sleeper and, finally, the observa-

tion-parlor car, all being Rock Island equipment, except the sleeper. The colored-passenger coach, though of standard size and steel construction, was an old combination affair, not air conditioned. It was divided by partitions into three main parts, one for colored smokers, one for white smokers, and one, in the center, for colored men and women, but primarily the latter and known as the women's section, each section having seats for about 20 passengers. Complainant sat in the women's section. There was a toilet in each section, but only the one in the women's section was equipped for flushing and it was for the exclusive use of the colored women. The car was without wash basins, soap, towels, or running water, except in the women's section. According to complainant, the car was filthy and foul smelling, but the testimony of defendants, as we shall later see, is to the con-

trary. The car contained, besides complainant, several other colored passengers, including women. Two pairs of seats in the colored men's section were used as an office by the conductor and the flagman, who were white. These conditions had prevailed for at least 25 years.

The above facts are gathered principally from complainant's testimony, but several other colored persons, who had traveled from Memphis to Hot Springs over the Rock Island at times during the above-mentioned period, gave similar testimony as to the condition of the cars in which they [fol. 32] rode. They also told of colored coaches between these points that had common toilets for men and women and of the absence of carpets and foot rests, while much more desirable accommodations were provided for white passengers traveling in coaches.

Docket No. 27844—Sheet 7

Defendant's witnesses, namely the conductor and flagman of the train and the superintendent who had charge of cleaning the equipment at Memphis, testified that they noticed no dirt, filth, or obnoxious odors in the car; that in accordance with the usual practice it was thoroughly cleaned, disinfected, equipped with newly laundered seat and seat-back linen covers, and inspected at Memphis before being put into the train. Each section of the car contained a cooler of ice water and a 12-inch electric fan. Incidentally, the Rock Island employs eight men at Memphis preparing equipment for 13 or 14 trains per day.

Since the early part of July, 1937, when the coach above described was taken out of service, the Rock Island has operated a modern combination coach between Memphis and Hot Springs. It is of all-steel construction, with six-wheel trucks. It is divided by a partition into two sections, one for colored and the other for white passengers. It has comfortable seats, linoleum floor covering, and is air conditioned. In each section there are wash basins, running hot and cold water, free paper towels and drinking cups, and separate flush toilets for men and women. There is no smoker section, as smoking nowadays is generally permitted in all coaches and sections thereof, and even in some instances, or to some extent, in Pullman cars. The combination coach is as fully desirable in all its appointments as the coach used entirely by white passengers traveling at

second-class fares. One of the complainant's witnesses testified that as late as September, 1937, he found conditions in the colored-passenger coach between Memphis and Hot Springs "very bad", but evidently he was not riding [fol. 33] the train that carried the new car — same toilet.

Docket No. 27844—Sheet 8

Only about 1 negro to 20 white passengers rides this train from and to points on the line between Memphis and Hot Springs, and there is hardly ever a demand from a colored passenger, for Pullman accommodations; the conductor recalled but 10 or 12 instances, in the past 32 years of his service on the train, wherein colored passengers who had entered Pullman cars were required by him to move into the colored-passenger coach. He estimated that the demand for Pullman accommodations did not amount to one per year. What demand there may have been at ticket offices does not appear.

The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, but there are no dining-car nor observation-parlor car accommodations for the latter and they can not lawfully range through the train.

Various previous proceedings akin to this are Councill v. Western & A. R. Co., 1 I. C. C. 339; 1 I. C. R. 638; Heard v. Georgia R. Co., 1 I. C. C. 428; 1 I. C. R. 719; Edwards v. Nashville, C. & St. L. Co., 12 I. C. C. 247; and Crosby v. St. Louis-S. F. Ry. Co., 112 I. C. C. 239. In the first four proceedings affirmative findings and orders were entered requiring the removal of unjust discrimination and undue prejudice to colored passengers, but not in the last cited case. Each rested on its own facts. None presented the same situation as the instant proceeding.

Several decisions of the Supreme Court are referred to. In Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, and Chesapeake & O. Ry. Co. v. Kentucky, 179 U. S. 388, statutes of the States of Mississippi and Kentucky requiring segregation of colored passengers in intrastate com-

Docket No. 27844—Sheet 9

[fol. 34] merce were upheld as not repugnant to the commerce clause of the Constitution. The State courts, at least

for the purpose of limiting the constitutional question, had held that the statutes applied only intrastate, and the question of whether they were constitutional, so far as interstate traffic was concerned was not decided. In Chiles v. Chesapeake & O. Ry. Co., 218 U. S. 71, dealing with coach passengers, the Supreme Court held that in a southern State a railroad has the right, by the establishment of appropriate rules and regulations, to require segregation, intrastate and interstate, aside from any statutory requirements, provided substantially the same accommodations are furnished for the two races. It said that railroad regulations respecting this matter were subject to the same tests of reasonableness as those enacted by legislative authority and that rules and regulations induced by the general sentiment of the community for which they are made and upon which they operate are not unreasonable. In McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151, several negroes attacked, before it became effective, a statute of the State of Oklahoma requiring segregation, on the ground that it violated the fourteenth amendment. They sought to enjoin the carrier defendant therein from complying with its terms, but no basis was shown for equitable relief and the decree of the lower court dismissing the bill was affirmed. In South Covington & C. Street Ry. Co. v. Kentucky, 252 U. S. 399, the Supreme Court held that the Kentucky segregation statute, as applicable intrastate to an interurban electric carrier, which also operated principally interstate, was not an unconstitutional interference with interstate commerce.

Docket No. 27844—Sheet 10

Complainant urges that defendants, to remove and avoid unjust discrimination and undue prejudice, are bound to provide the same equipment and accommodations for colored [fol. 35] passengers as for white passengers. In other words, he says, that if defendants are to continue all the present first-class accommodations for white passengers, they must provide similar accommodations for colored passengers on the same basis of charge. He understands that it is for defendants to determine whether this equality of treatment should be accomplished by the running of extra cars solely for colored passengers or by partitions in the cars now operated. The statute sets up two distinct groups of passengers, and the question for our determination is

whether the circumstances and conditions surrounding these respective kinds of traffic are so substantially different as to justify the difference in treatment here alleged to be unlawful.

Complainant contends that the extent of the demand for first-class accommodations for colored passengers has no bearing on the question presented. He urges that McCabe v. Atchison, T. & S. F. R. Co., supra, is to the effect that a constitutional right is personal and that lack of volume of colored traffic or limited demand by colored passengers for Pullman space is no defense to a charge that under segregation which results in the occupancy of unequal facilities colored passengers are denied equal protection of the laws. That case dealt with an Oklahoma statute which allowed defendants to provide sleeping cars, dining cars, and chair cars to be used exclusively by either white or negro passengers, separately but not jointly. The court below had concluded that sleeping cars, dining cars, and chair cars, were, comparatively speaking, luxuries, and that it was competent

for the legislature to take into consideration the limited demand for such accommodations by one race, as compared with the demand on the part of the other. Complainant relies upon the following statement contained in the Supreme Court's decision:

[fol. 36] It is not questioned that the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodations for negroes. The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the Attorney General of the State, in the brief filed by him in support of the law, urges that "the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or, sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars,

diners nor sleepers, except when the market offered reasonably demands the facility." And in the brief of counsel for the appellees, it is stated that the members of the legislature "were undoubtedly familiar with the character and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel" in that State.

This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of [fol. 37] persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey

which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

Defendants say that what the Court evidently meant by this comment was that a carrier could not absolutely refuse to afford colored passengers Pullman accommodations, but had to provide them if there was reasonable demand from colored passengers. In any event, we are not here considering a constitutional question, but rather questions of the act. Volume of traffic is an important consideration in determining whether certain services demanded are warranted and whether a difference in treatment is justified.

At the hearing complainant stated that segregation was not involved and apparently for the purpose of this case he accepted it, regarding the Arkansas statute as requiring it in that State for all passengers, both interstate and intrastate. However, in his exceptions he opposes it as abominable and urges that the statute does not require it as to

interstate passengers. The statute is general in its terms in that like the Mississippi and Kentucky statutes dealt with by the Supreme Court, it does not mention either intrastate or interstate passengers. These latter statutes, as already stated, were by State courts confined to intrastate passengers and the Supreme Court accepted these constructions as binding on it. Complainant also relies on the Supreme Court's conclusion in McCabe v. Atchison, T. & S. F. R. Co., supra, to the effect that the Oklahoma statute had to be construed as applying only intrastate because

there had been no construction to the contrary by the State court. Be that as it may, the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and while it is not for us to construe the statute, we think, in view of its general terms, that until further informed by judicial determination, defendants are justified, as a matter of self protection, in assuming that it applies to interstate, as well as intrastate, traffic. What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute.

Complainant urges that collection of the first-class fare, notwithstanding the fact that second-class accommodations were furnished him, was violative of sections 1, 2, 3, and 6 of the act, also of the fourteenth amendment, on the ground that he was deprived of money without due process of law and denied equal protection of the laws. It is sufficient to say that a first-class ticket was furnished and charged for because complainant wanted it, and that after it developed that the first-class accommodations ordinarily available for colored passengers west of Memphis were all taken by other passengers defendants offered to refund the difference. Moreover, as already stated, complainant is here seeking no relief from the charges paid.

Complainant urges also that the Rock Island, having received from him the first-class fare but having failed to furnish first-class accommodations west of Memphis, violated section 13(4) of the act. That provision relates to intrastate fares that are unjustly discriminatory or unduly prejudicial in their relation to interstate fares. No

Docket No. 27844—Sheet 14

intrastate fares are here involved. There was no break in complainant's journey at the Tennessee-Arkansas State [fol. 39] line. He was engaged in through interstate travel from Chicago to Hot Springs. Moreover, as said in the next preceding paragraph, complainant was furnished a first-class ticket because he asked for it, and refund awaits him.

Regardless of what finding may be made respecting the Rock Island, the Illinois Central asks that the complaint be dismissed as to it. There is no showing that colored passengers are treated differently from white passengers on their journeys from Chicago to Memphis and apparently that road is in no way chargeable with discrimination, even though it participates in the through transportation under joint fares and other arrangements. This carrier is a proper, but perhaps not necessary party. It was named as a defendant apparently out of abundance of caution, because it participated in the movement.

The Pullman Company also asks dismissal, regardless of what may be done as to the Rock Island, contending that it is not chargeable with discrimination, because it provides accommodations in the form of drawing rooms, which if not already occupied or reserved for someone else, are available for colored passengers west of Memphis at the 90-cent charge. There is no discrimination on its part.

It is not for us to enforce the State law. We understand that to be a matter for State authorities. But in deciding the case on the facts presented we must recognize that under the State law defendants must segregate colored passengers. In these circumstances we find that the present colored-passenger coach and the Pullman drawing rooms meet the requirements of the act; and that as there is comparatively little colored traffic and no indication that there is likely

Docket No. 27844—Sheet 15

to be such demand for dining-car and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice is plainly not un-[fol. 40] just or undue. Only differences in treatment that

are unjust or undue are unlawful and within the power of this Commission to condemn, remove, and prevent.

The complaint will be dismissed.

Eastman, Commissioner, dissenting:

In his dissenting expression Commissioner Lee has correctly indicated the rule which railroads must follow to avoid unlawful discrimination between white and colored passengers, where State statutes require their segregation. So far as coach travel is concerned, it is clear that the Rock Island was not conforming to this rule, when complainant made his trip to Hot Springs, but is probably conforming to it now. So far as Pullman accommodations are concerned, I am not satisfied that defendants were observing the rule then or that they are observing it now.

The latter conclusion I reach reluctantly, for I realize that, where segregation is required, the practical difficulties of observing the rule with respect to Pullman accommodations are very great. The facts are that white passengers were and are given adequate opportunity to obtain seats, berths, compartments, or rooms in Pullman cars, together with the right to use any dining car or observation car that may be attached to the train, whereas colored passengers have no opportunity to obtain seats or berths in the body of the car or to use dining or observation cars, but may obtain accommodations in a compartment or room, provided one can be found that has not been previously been taken

by a white passenger. If the conditions were reversed, I cannot believe that the white passengers would regard this as equality of treatment and opportunity.

The practical difficulty lies, of course, in the fact that the demand for Pullman accommodations on the part of colored passengers is very small. So long as this condition exists, [fol. 41] I am not prepared to say that it is necessary for a railroad to attempt the partition of observation or dining cars, but I do believe that it is necessary to provide some Pullman space, small though it may be, which will be reserved for the occupancy of colored passengers and which white passengers will not be permitted to occupy, and to

provide means by which meals from the dining car may be served in such space.

Lee, Commissioner, dissenting:

The rule was laid down in the early days of this Commission that it was the duty of the railroads to furnish, for all passengers paying the same fare, cars in all respects equal and provided with the same comforts, accommodations, and protection for travelers. Councill v. Western & Atlantic R. R. Co., 1 I. C. C. 339; William H. Heard v. The Georgia R. R. Co., 1 I. C. C. 428. It was further held "* * * that the separation of white and colored passengers paying the same fare is not unlawful if cars and accommodations equal in all respects are furnished to both and the same care and protection of passengers is observed." Edwards v. Nash., Chat. & St. Louis Ry. Co., 12 I. C. C. 247. In the latter case the Commission said:

"While, therefore, the reasonableness of such regulation as to interstate passenger traffic is established, it by no means follows that carriers may discriminate between white and colored passengers in the accommodations which they furnish to each. If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accom-

modations shall be provided for colored passengers of the same class. The principle that must govern is that the carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this [fol. 42] is discrimination and subjects the passenger to 'undue and reasonable prejudice and disadvantage.'"

In each of the three cases, because the railroad had furnished colored passengers inferior accommodations to those furnished white passengers of the same class, a finding of discrimination was made. No decision has been found in which this Commission, on such facts, has held to the contrary.

In this case complainant, traveling on a first-class ticket and offering to pay for a seat in the Pullman car, to which the Pullman porter had assigned him, and in which there was "plenty of space", was required to move from the

Pullman car into the coach provided for colored passengers. The latter was described as "an old combination affair", not air-conditioned, which was divided into three parts, and, except in the women's section, was without wash basins, soap, towels, or running water.

Testifying for defendants, the conductor, who refused to sell complainant a seat in the Pullman car, and had him removed into the coach provided for colored passengers, said that "during the thirty-two years I have worked over there in Arkansas, for the Rock Island Railroad Company, it has never had any first-class accommodations for Negroes" and "I would not have sold a seat in Section 3 or any other space in the Pullman car to Congressman Mitchell because he was a colored person." Witnesses other than complainant testified that they had been refused Pullman accommodations on Rock Island trains solely because they were Negroes. In view of this evidence, I question the statement in the report that Pullman accommodations ordinarily "are available to colored passengers upon demand."

Docket No. 27844—Sheet 18

If the action complained of does not constitute undue or unreasonable prejudice or disadvantage under the act, as [fol. 43] those terms are understood, then I am at a loss to understand their meaning. The act which we administer authorizes no difference in treatment of passengers because of color, and it is my understanding that the segregation statutes of the State require equal accommodations for persons of the two races.

No doubt the action of the Rock Island in refusing to permit complainant to occupy a seat in the Pullman car was due to the State statute, requiring the segregation of white and colored passengers. Conceding the carrier's legal right to segregate white and colored passengers in the State of Arkansas, in segregating such passengers, it must accord to one class accommodations substantially equal to those accorded the other. If the carrier provides certain accommodations for first-class white passengers, it is required to provide substantially similar accommodations for colored passengers of the same class. In my opinion, when the railroad refused complainant Pullman accommodations and required him to ride in the coach provided for colored passengers, it violated the act in failing to furnish him sub-

stantially similar accommodations to those furnished white people willing, as he was, to pay therefor.

I am authorized to state that Commissioners Aitchison and Porter joint in this expression.

Miller, Commissioner, dissenting in part:

I am in accord with the conclusion of the majority that the present accommodations over the lines of defendants on through journeys from Chicago, Ill., to Hot Springs, Ark., do not result in unjust discrimination or undue prejudice. The demand of colored passengers for Pullman accommoda-

tions over the route in question is shown by the evidence of record to have been negligible over a period of many years. The provisions for such few colored passengers as have desired to avail themselves of that service is shown to have [fol. 44] been, and to be, ample under ordinary circumstances. Had complainant made Pullman reservations somewhat in advance of the date of travel I am convinced that he would have had no difficulty in obtaining suitable accommodations over the entire route.

With respect to the service rendered complainant from Memphis to Hot Springs in lieu of Pullman accommodations, however, I am of the view, and I think the report should so find, that the coach accommodations furnished complainant resulted in unjust discrimination and undue prejudice. The preponderance of the evidence of record indicates that the coach services afforded complainant, as well as other colored passengers, were decidedly inferior to those afforded white passengers and to which all passengers are entitled. It appears that the improvement in the colored coach service which has taken place over the route in question since this complaint was filed has made such service satisfactory.

When a colored person purchases a first-class ticket in a state where segregation is not required to a point in a state where it is required, or through such a state such dissatisfaction and trouble as was here incurred by complainant may, I think, be avoided by advice of the ticket agent to the effect that through Pullman accommodations should be secured in advance.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1938

No. 27844

ARTHUR W. MITCHELL

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by [fol. 45] the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is Ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

W. P. Bartel, Secretary. (Seal)

XIX

A copy of the report of the Commission was received on November 28, 1938 by the plaintiff and on, to wit: January 23, 1939 a petition for rehearing and re-argument was filed by the plaintiff.

XX

That on about February 2, 1939 the defendant, Rock Island, filed its reply to the plaintiff's petition for rehearing and re-argument.

XXI

On or about March 6, 1939, the Commission filed its order, denying the petition of the plaintiff for rehearing and re-argument, a copy and notice of the said order was received by the plaintiff March 20, 1939 and a copy of the said order is hereto attached, marked Exhibit C and made a part hereof, and is as follows:

EXHIBIT "C"

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of March, A. D. 1939.

[fol. 46] No. 27844

ARTHUR R. MITCHELL

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, ET AL.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition of complainant for rehearing and reargument:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal)

XXII

All of the various steps in the above recited proceedings were taken in accordance with the said Act of Congress and the rules of the Interstate Commerce Commission.

XXIII

Plaintiff avers that he has been damaged and injured by the order of the Interstate Commerce Commission entered November 7, 1938 and the order of the said Commission entered March 6, 1939 as aforesaid.

XXIV

That the said order entered November 7, 1938 dismissing the complaint is inconsistent with the evidence produced by the defendant, Rock Island and with the findings contained in the proposed report of the Examiner and the report of the commission.

XXV

That the undisputed and uncontradicted testimony of the chief witness, Albert W. Jones, a conductor on the [fol. 47] Rock Island for thirty-two years, offered by the defendant, Rock Island, fully sustains the allegations contained in the complaint filed before the Commission, an excerpt from the abstract of his testimony as contained in the initial brief of the complainant and which was before the Commission is as follows:

p. 43:

"The only provision that the Rock Island has for carrying all colored passengers is in that part of the Jim Crow car." A colored person who has a first class ticket is compelled to ride in the Jim Crow car with all other colored persons who have second-class tickets or "two-cent-per-mile" tickets. "A white person with a first-class ticket is entitled to use the Pullman, the diner and observation car, which provide first class accommodations. (Rec. 148.)"

p. 44:

"The Rock Island Railroad Company has no such first-class accommodations for negroes, although the negroes may have first-class tickets on the Rock Island Railway or 'three-cent-per-mile' tickets. During the thirty-two years I have worked over there in Arkansas, for the Rock Island Railroad Company it has never had any first-class accommodations for Negroes (Rec. 149). And they haven't any first-class accommodations in the sleeping cars for Negroes now."

"The Rock Island Railroad Company does not at this time have any first-class accommodations for colored passengers paying the 'three-cent-a-mile' fare permitting them to use the observation car which belongs to the Rock Island. They cannot use the dining car, nor sleeping car, although they may hold first-class tickets."

p. 45:

"Congressman Mitchell was sitting in Section 3 of the Pullman car alone (Rec. 154). I do not know if anyone occupied Section 3 from Memphis to Hot Springs on April 21st, but whether the space had been sold or not. I would [fol. 48] not have sold a seat Section 3 or any other space

in that Pullman car to Congressman Mitchell, because he was a colored person. I know he had a first-class interstate round-trip ticket from Chicago, Illinois, to Hot Springs, Arkansas."

"The accommodations furnished to Negro passengers in the Jim Crow car where Congressman Mitchell was compelled to ride are not equal to the accommodations furnished in the observation car by the Rock Island Railway to white passengers holding first-class tickets" (Rec. 155).

"There is porter service furnished to the passengers in the observation car but no porter service furnished to the colored passengers in the Jim Crow cars" (Rec. 157).

"The Jim Crow car which all colored passengers were compelled to ride in in April, 1937, had three compartments (Rec. 158). There was no running water, no wash basins or towels. There were only paper towels furnished in the compartment of the Jim Crow car but linen and paper towels were furnished in the observation car (Rec. 160). There was only one toilet in the compartment where Congressman Mitchell was riding in the Jim Crow car, which was 'for women'. There was none for men who were riding in that compartment" (Rec. 161).

p. 46:

"I have never sold any colored person any space or accommodations in the Pullman car during my entire service."

"But I had charge of the train as the conductor for the company and having charge of the train for the company I felt it was my duty to put the congressman out of the sleeping car into the Jim Crow car (Rec. 168). The congressman did complain and protest being put out of the Pullman car. He showed me his ticket and offered to pay for the accommodations. But I told him he was a colored man and couldn't ride in those first-class accommodations. If there had been a white passenger with a first-class ticket who had boarded the train at Memphis, [fol. 49] for Hot Springs, and had asked for a berth or a seat in that Pullman car, where there were vacant seats or had asked for a seat in the observation car, I would have sold it to him. I do not know how many colored people apply for Pullman tickets in Hot Springs, for Chicago, and are refused (Rec. 169). If the compartments

or stateroom are occupied, no colored person can ride in the body of the sleeping car. No colored persons are allowed to ride in the observation car which belongs to the Rock Island, even if they have first-class tickets. Those are the rules of the railway company and I follow the rules."

p. 47:

"I sell space on that train for seats in the observation car but would not sell a colored person any accommodations in the observation car, although he had a first-class ticket (Rec. 171). The white people and colored people are charged the same fare for the 'three-cent-per-mile' ticket, or the 'first-class tickets' (R. 172). There is no difference in the charge for the ticket because of color. The Pullman car is better equipped than the Jim Crow car. If a white passenger with a first-class ticket was put out of the Jim Crow car he could receive the first-class accommodations of the Pullman car, and would not be compelled to purchase a compartment or a seat in the compartment. He could buy a seat in the Pullman car or observation car, or parlor car. The only requirement is, his having a first-class or 'three-cents-per-mile' ticket. They have the entire car (Rec. 174). Colored people cannot ride in that car, even if they have a first or second-class ticket. All the colored people who ride on my train must stay in the Jim Crow car, no matter what kind of a ticket they have."

XXVI

Plaintiff alleges that the Commission's said findings and orders are erroneous, invalid, unlawful and void for the following reasons:

[fol. 50] 1. Said order dismissing the complaint of the plaintiff and the findings upon which said order is based are arbitrary and unjust.

2. Said order and findings are contrary to the evidence of record.

3. Said order and findings are without support of any substantial evidence in the record.

4. Said order and findings are without support of any evidence in the record before the said Commission in the proceedings in which they are made.

5. Said order and findings are against the indisputable character of and the manifest weight of the evidence.

6. In making the order and findings the Commission proceeded upon the misapprehension of the law.

7. In making the order and the findings the Commission disregarded the undisputed and uncontradicted evidence contained in the record.

8. There are no findings of fact to support the order of the Commission.

9. The Commission proceeded under erroneous constructions of law and misapprehensions in respect of its powers.

10. That said order and findings are contrary to the laws of the United States of America.

11. Said order and findings conflict with the former decisions of the Interstate Commerce Commission in cases involving the identical situation as the case at bar.

12. Said orders and findings are contrary to and conflict with the United States Constitution and all amendments thereto.

[fol. 51] 13. Said order and findings are contrary to and conflict with the Enforcement Acts of the United States.

14. Said order and findings are a denial of the plaintiff of the due process of law as guaranteed by the Fourteenth Amendment of the United State's Constitution.

15. Said order and findings are a denial of the equal protection of the laws to the plaintiff as guaranteed by the Fourteenth Amendment of the United States Constitution.

XXVII

All of the matters herein alleged plaintiff offers to prove.

XXVIII

That the plaintiff will suffer irreparable loss and damage unless the said order entered November 7, 1938 be set aside, annulled and vacated.

XXIX

In Tender Consideration Whereof and inasmuch as your petitioner, the plaintiff herein, has no adequate remedy at

law, and may have relief only in a court of equity, petitioner prays:

1. That the petition be received and filed.

2. That writs of subpoena be issued by the clerk of the court, as provided by law, commanding the United States of America, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the estate of the Chicago, Rock Island & Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation, and Pullman Company, a corporation, defendants herein, to appear and defend this action.

[fol. 52] 3. That notice hereof be given to the attorney general of the United States and all other persons required by law to be notified.

4. That upon the filing of this petition the Judge of this court shall call to his assistance in the hearing and determination thereof two other Judges, one of whom shall be a Circuit Judge, as provided by law.

5. That upon final hearing of this cause, this Honorable Court will enter its decree that said order of the said Interstate Commerce Commission as aforesaid is null and void and further decree that said order be set aside, annulled and vacated.

6. That a decree be entered granting to the plaintiff the relief prayed for in his complaint filed before the said Commission.

7. And that any and all other and further relief may be granted to the plaintiff as shall seem meet and just.

Arthur W. Mitchell,
Plaintiff,
By Richard E. Westbrooks,
Solicitor for Plaintiff
Richard E. Westbrooks,
3000 South State Street, Chicago, Illinois
and
Arthur W. Mitchell, Pro Se,
417 East 47th Street, Chicago, Illinois,
Attorneys for the Plaintiff.

[fols. 53-57] *Duly sworn to by Richard E. Westbrooks. Jurat omitted in printing.*

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed June 9, 1939

United States of America, one of the defendants named in the petition filed in the above entitled cause, answers and says:

I

United States admits the truth of the facts alleged in paragraphs numbered I to XXII, both inclusive, of the petition, except that, with respect to Paragraph XII, it denies that a transcript of the evidence before the Interstate Commerce Commission was attached to, or made a part of, the copy of the petition served upon this defendant and United States has no knowledge whether plaintiff will offer such transcript upon the hearing in this case.

II

United States denies the matters, things, and conclusions alleged in Paragraphs XXIII to XXVIII, both inclusive, of the petition, except that it admits that Paragraph XXV of the petition quotes a part of the evidence of record before [fols. 59-60] the Commission, but denies that the testimony as quoted in said paragraph constitutes all the evidence submitted to and considered by the Commission.

III

Further answering the petition, United States denies that the facts therein alleged are sufficient to constitute a cause of action against the United States or to entitle plaintiff to the relief prayed or to any other relief.

Wherefore, having fully answered, United States prays that the relief sought by the petition be denied and that the petition be denied at the cost of the plaintiff, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. Thurman Arnold, Assistant Attorney General. William J. Campbell, United States Attorney.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed June 19, 1939

To the Honorable Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code (36 Stat. L 1150, U. S. C., tit. 28, sec. 45a), we hereby enter the appearance of the Interstate Commerce Commission as a party defendant in the above-entitled case, and of ourselves as its counsel.

Daniel W. Knowlton, Chief Counsel. J. Stanley Payne, Assistant Chief Counsel.

Washington, D. C., June 15, 1939.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 19, 1939

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled action, answers and says:

I

Answering paragraphs I to XXII, both inclusive, of the petition, the Commission admits, for the purposes of this suit, that the allegations contained therein are true. The report of the Commission in its Docket No. 27844, Arthur W. Mitchell v. Chicago, Rock Island & Pacific Railway Company et al., referred to in paragraph XVIII of the petition, is officially reported in 229 I. C. C. 703.

II

Answering paragraphs XXII, XXIII, and XIV, of the petition, the Commission denies the allegations contained therein.

[fol. 63]

III

Answering paragraph XXV of the petition, the Commission denies the allegations contained therein, with the following exceptions: It admits that Albert W. Jones testified in the proceeding before the Commission entitled No. 27844, Arthur W. Mitchell v. Chicago, Rock Island & Pacific Railway Company et al., but denies that the excerpt from the abstract of his testimony as quoted on pages 43-45 of the petition is a full, accurate and complete statement of his testimony, and the Commission respectfully refers the Court to the testimony itself, appearing at pages 99-181 of the official transcript of the testimony before the Commission, a complete copy of which, it is alleged in paragraph XII of the petition, will be offered on behalf of the plaintiff at the hearing on his petition before this Court. The Commission respectfully calls the Court's attention to the fact that other evidence than that of the above-mentioned witness was introduced at the hearing before the Commission.

IV

Answering paragraphs XXVI to XXVIII, both inclusive, of the petition, the Commission denies the allegations contained therein.

V

Further answering paragraph XXVI of the petition, the Commission alleges that the gravamen of plaintiff's complaint to the Commission was that he was subjected to unjust discrimination and undue prejudice, in violation of sections 2 and 3 (1) of the Interstate Commerce Act, in connection with accommodations furnished to him on a journey from Chicago, Ill., to Hot Springs, Ark., April 20-21 1937; that in the proceedings before the Commission plaintiff was accorded the full hearing provided for in [fol. 64-65] and by the Interstate Commerce Act; that at the hearing on his complaint to the Commission a large volume of testimony and other evidence bearing upon the subject matter of the complaint was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff by his counsel; that in briefs filed in said proceeding and in oral argument questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties

by their respective counsel, and the Commission determined said matters and entered and served upon the plaintiff and other interested parties its said report and order, in which the Commission found that plaintiff had not been subjected to unjust discrimination or undue prejudice, and entered an order dismissing the complaint.

Wherefore, having fully answered, the Commission prays that the relief sought by the petition be denied and that the petition be dismissed.

Interstate Commerce Commission, By J. Stanley Payne. Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY, A CORPORATION.—Filed June 16, 1939

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, a corporation, by Wallace T. Hughes and Daniel Taylor, their attorneys, answering the petition of the plaintiff, say:

I

They admit the facts alleged in paragraphs I to XXI, inclusive, of the petition, except (a) as to the allegations in paragraph II of the petition, these defendants deny that they are a corporation, but on the contrary say that they are Trustees having charge, control and possession of The Chicago, Rock Island and Pacific Railroad under and by virtue of their appointment as such by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain proceeding, therein pending, for the reorganization of a railroad under Section 77 of the Bankruptcy Act of the United States; and, (b) except as [fol. 67] to paragraph XII, they deny that a transcript of the evidence before the Interstate Commerce Commission was attached to, or made a part of, the copy of the petition

served upon these defendants, and defendants have no knowledge whether plaintiff will offer such transcript upon the hearing in this case.

II

These defendants deny the matters, things and conclusions alleged in paragraphs XXIII to XXVII, both inclusive of the petition, except that they state that paragraph XXV of the petition quotes a part only of the evidence of record before the Commission, and they deny that the testimony so quoted in said paragraph constitutes all of the testimony of Witness Albert W. Jones, or all of the evidence submitted to the Interstate Commerce Commission upon which that body made its findings and reached its conclusions.

III

These defendants deny that the facts, matters and things alleged in the petition are sufficient to constitute a cause of action against these defendants or to entitle the plaintiff to the relief prayed in his petition or to any other relief.

Wherefore, having fully answered, these defendants, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, pray that the relief sought by the petition be denied and that the petition be dismissed at the cost of the plaintiff.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation. By: Wallace T. Hughes, Daniel Taylor. Their Attorneys, 1025 LaSalle Street Station, Chicago, Ill.

[fols. 68-69] CERTIFICATE OF SERVICE

I hereby certify that copies of this answer have been served this day upon plaintiff and other defendants by mailing the same to their respective attorneys in envelopes properly addressed.

Daniel Taylor, Attorney for Defendants, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation.

Chicago, Ill., June 16, 1939.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF THE PULLMAN COMPANY, A CORPORATION, TO THE PETITION OF ARTHUR W. MITCHELL—Filed June 17, 1939

The Pullman Company, one of the defendants herein, by Lowell M. Greenlaw, Charles S. Williston, Herbert S. Anderson and Erwin W. Roemer, its attorneys, answering the petition of the plaintiff:

1. Denies the allegations of paragraph II of the petition so far as such allegations pertain to this defendant, and alleges that it is organized and incorporated as a corporation under the laws of the State of Illinois and authorized to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and to sell or use, or permit to be used, the same in such manner and upon such terms as it may think fit and proper.

[fol. 71] 2. Denies the allegations of paragraph III of the petition so far as such allegations pertain to this defendant, and alleges that this defendant is a sleeping car company subject to provisions of the Interstate Commerce Act and that as such sleeping car company it furnishes sleeping car accommodations to passengers traveling between points stated in paragraph III, when such passengers contract with this defendant for such accommodations in accordance with the provisions of this defendant's tariffs on file with the Interstate Commerce Commission.

3. Admits the filing by the plaintiff herein on, to-wit, September 2, 1937, of a written complaint with the Interstate Commerce Commission in form and substance as set forth in paragraph VI of said petition.

4. Admits the allegations of paragraphs VII and VIII of said petition.

5. Admits the allegations of paragraph IX of said petition and states that the full and complete answer of The Pullman Company filed in said proceedings before the Interstate Commerce Commission was as follows:

"Answer of Defendant, The Pullman Company"

"The Pullman Company, defendant, for its answer to the complaint herein, says:

"1. It admits the allegations of Paragraph I in said complaint.

"2. It denies the allegations of Paragraph II of said complaint so far as such allegations pertain to this de- [fol. 72] fendant, and states that this defendant is a sleeping car company subject to the provisions of the Interstate Commerce Act, and that as such sleeping car company it furnishes sleeping car accommodations to passengers traveling between points stated in said Paragraph II, when such passengers contract with this defendant for such accommodations in accordance with provisions of this defendant's tariffs on file with the Interstate Commerce Commission.

"3. It denies the allegations of Paragraph III of said complaint so far as such allegations apply to this defendant, and states that the only charge paid by complainant to this defendant in connection with the journey referred to was for a compartment in this defendant's sleeping car between Chicago, Illinois, and Memphis, Tennessee; that this defendant furnished to complainant the accommodations for which he paid and that such accommodations were fully equal to the accommodations furnished other patrons of this defendant, paying the same fare. This defendant received no fare and made no contract with complainant for any accommodations in this defendant's cars for the portion of complainant's journey between Memphis, Tennessee, and Hot Springs, Arkansas.

"4. It denies all of the allegations of Paragraph IV of said complaint, so far as they pertain to this defendant, and in that connection states the facts to be as alleged in Paragraph 3 of this answer.

[fol. 73] "5. It denies all of the allegations of Paragraph V of said complaint so far as they pertain to any prejudice or disadvantage or inferior accommodations with respect to complainant's journey from Chicago to Memphis in the car in which he had purchased Pullman accommodations. With respect to the alleged inferior accommodations in the equipment occupied by complainant between Memphis and Hot Springs, this defendant states that such equipment

and accommodations were not owned or controlled or operated by this defendant.

"6. It denies the allegations of Paragraph VI of the complaint so far as they relate to any act or ommission of this defendant, and states the facts to be as heretofore alleged in this answer.

"7. It denies the allegations of Paragraph VII of the complaint, so far as they relate to any act or ommission of this defendant.

"This defendant denies that complainant is entitled to the relief prayed for in his complaint against this defendant.

"Wherefore this defendant prays that the said complaint may be dismissed as to this defendant.

"Dated at Chicago, Illinois, this 22nd day of September, A. D., 1937.

"The Pullman Company. By G. A. Kelly, Vice President. L. M. Greenlaw, Attorney for The Pullman Company, 79 East Adams Street, Chicago, Illinois."

[fol. 74] 6. Admits the allegations of paragraphs X to XXII, inclusive, of said petition.

7. Denies that the plaintiff has been damaged and injured by the order of the Interstate Commerce Commission entered November 7, 1938, and the order of the said Commission entered March 6, 1939, as alleged in paragraph XXIII of said petition.

8. Denies that the said order entered November 7, 1938, dismissing the complaint, is inconsistent with the evidence produced and with the findings contained in the proposed report of the Examiner and the report of the Commission, as alleged in paragraph XXIV of said petition.

9. Denies that the testimony of Albert W. Jones, a conductor on the Rock Island, sustains the allegations contained in the complaint filed before the Commission, as alleged in paragraph XXV of said petition, and alleges that the testimony of said Albert W. Jones and other testimony are consistent with the dismissal of the complaint as to this defendant and denies that the testimony set forth in said paragraph XXV constitutes all the evidence submitted to and considered by the Commission.

10. Denies that the findings and orders of the Interstate Commerce Commission are erroneous, invalid, unlawful or void for the reasons alleged by the plaintiff in paragraph XXVI of said petition, or for any other reasons, and alleges:

(1) That said order dismissing the complaint of the plaintiff and findings upon which said order is based are not arbitrary and unjust.

[fol. 75] (2) That said order and findings are consistent with the evidence of the record.

(3) That said order and findings are supported by the evidence of the record.

(4) That said order and findings are supported by the evidence in the record before the Interstate Commerce Commission in the proceedings in which they were made.

(5) That said order and findings are consistent with the character of and the manifest weight of the evidence.

(6) That in making the order and findings the Interstate Commerce Commission proceeded with full knowledge of and in conformity with the law pertaining thereto.

(7) That in making the order and the findings the Interstate Commerce Commission gave due regard to the evidence contained in the record.

(8) That there are findings of fact to support the order of the Interstate Commerce Commission.

(9) That the Interstate Commerce Commission proceeded under and by reason of a proper and correct construction of law and of its powers.

(10) That the said order and findings are consistent with the laws of the United States of America.

(11) That said order and findings are consistent with the former decisions of the Interstate Commerce Commission in analagous situations.

(12) That said order and findings are consistent with the Constitution of the United States of America and all amendments thereto.

(13) That said order and findings are consistent with the Enforcement Acts of the United States of America.

(14) That said order and findings adequately grant to the plaintiff due process of law guaranteed by the Constitution of the United States of America.

(15) That said order and findings are consistent with and a grant to the plaintiff of equal protection of the laws guaranteed by the Constitution of the United States of America.

[fols. 76-77] 11. Denies that the plaintiff will suffer irreparable loss or damage unless the said order entered November 7, 1938, be set aside, annulled and vacated, as alleged in paragraph XXVIII of said petition.

12. Denies that the facts alleged in the petition are sufficient to constitute a cause of action against this defendant or to entitle plaintiff to the relief prayed or to any other relief.

Wherefore, this defendant respectfully prays that an order be entered herein dismissing the said petition as to this defendant.

The Pullman Company, by Lowell M. Greenlaw, Charles S. Williston, Herbert S. Anderson, Erwin W. Roemer, Its Attorneys.

[fol. 78] In United States District Court

[Title omitted]

Separate Answer of Illinois Central Railroad Company, a Corporation—Filed June 17, 1939

Comes now one of the defendants, Illinois Central Railroad Company, a corporation, sued herein under the name and style of Illinois Central Railway Company, by E. A. Smith, H. J. Deany and Robert Mitten, its attorneys, and answering the petition of plaintiff says:

I

This defendant admits the truth of the facts alleged in Paragraphs I to XXII, both inclusive, of the petition, except that it denies the allegations of Paragraph II of said petition so far as such allegations pertain to the defendant Pullman Company, and states that said Pullman Company

is a sleeping car company and not a railroad or transportation company; and except further that it denies the allegations of Paragraph III of said petition so far as such allegations pertain to this defendant, Illinois Central Railroad Company, being a common carrier engaged in interstate Commerce in the State of Arkansas, and states the fact to be that this defendant, Illinois Central Railroad Company, [fol. 79] is not engaged in interstate commerce between any points in the State of Arkansas.

II

This defendant denies the matters, things and conclusions alleged in Paragraphs XXIII to XXVIII, both inclusive, of the petition, except that it admits that Paragraph XXV of the petition quotes a part of the evidence of record before the Commission, but denies that the testimony so quoted in said paragraph constitutes all the evidence submitted to and considered by the Commission.

III

Further answering the petition this defendant, Illinois Central Railroad Company, denies that the facts therein alleged are sufficient to constitute a cause of action against any of the defendants, or to entitle plaintiff to the relief prayed or to any other relief.

IV

Further answering the petition this defendant, Illinois Central Railroad Company, denies that the facts therein alleged are sufficient to constitute a cause of action against this defendant, Illinois Central Railroad Company, or to entitle plaintiff to the relief prayed, or to any other relief against this defendant, Illinois Central Railroad Company.

Wherefore, having fully answered, this defendant, Illinois Central Railroad Company, prays that the relief sought by the petition be denied at the cost of the plaintiff, and that this defendant have the benefit of such other and further orders, decrees or relief as may be just and proper.

Illinois Central Railroad Company, by E. A. Smith, H. J. Deany, Robert Mitten, Its Attorneys, 135 East 11th Place, Chicago. Vernon W. Foster, of Counsel, 135 East 11th Place, Chicago, Illinois.

[fols. 80-81] CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing upon the attorneys of all parties of record by mailing a copy thereof to each party, properly addressed.

Dated at Chicago, Illinois, this 17th day of June, 1939.

V. W. Foster, of Counsel.

[fols. 82-83] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING CAUSE FOR HEARING—April 23, 1940

On motion of Plaintiff's Attorney It is Ordered that this cause be and the same is hereby set for hearing before three judges May 27, A.D. 1940

[fols. 84-85] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—June 27, 1940

Pursuant to Federal Equity Rule 70½, and Rule 52 of the Federal Rules of Civil Procedure, we find the facts to be as follows:

FINDINGS OF FACT

1. The order here in question was made by the Interstate Commerce Commission after a full hearing.

2. The Commission, after the hearing, found the facts specially, and stated separately its conclusions of law thereon, and they are made a part of these findings and conclusions respectively by reference.

3. The Commission's findings of facts were all supported by substantial evidence.

CONCLUSIONS OF LAW

1. The findings of the Commission are not erroneous.

2. The order of the Commission is not contrary to law.

3. The order of the Commission contravenes no provision of the Federal Constitution.

4. The order of the Commission is supported by the findings.

5. This court is without jurisdiction to grant the relief sought in the complaint, or any part thereof, and the complaint should be dismissed.

William M. Sparks, Cir. J. Charles E. Woodward, Dist. Judge. M. L. Igoe, Dist. Judge.

[fols. 86-87] In United States District Court for the Northern District of Illinois, Eastern Division

Present: Hon. William M. Sparks, Circuit Judge; Hon. Charles E. Woodward, District Judge; Hon. Michael L. Igoe, District Judge.

No. 500

Arthur W. Mitchell

vs.

United States of America

Order Dismissing Cause—June 27, 1940

Upon the findings of fact and conclusions of law this day entered herein

It Is Ordered and Decreed that this cause be and the same hereby is dismissed for lack of jurisdiction at the costs of the complainant.

[fol. 88] In United States District Court

[Title omitted]

Notice of Appeal—Filed August 23, 1940

To:

Elmer B. Collins, Esq., Solicitor for the United States of America, Washington, D. C.

J. Stanley Payne, Esq., Solicitor for the Interstate Commerce Commission, Washington, D. C.

Wallace T. Hughes and Daniel Taylor, Esquires, General Attorneys for Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation, LaSalle Street Station, Chicago, Illinois.

C. S. Williston, Esq., Solicitor for the Pullman Company, Pullman Building, 79 East Adams Street, Chicago, Illinois.

Robert Mitten, Esq., Commerce Attorney for the Illinois Central Railway Company, a corporation, 135 East 11 Place, Chicago, Illinois.

You and each of you are hereby notified that on the 23rd day of August, 1940, at ten o'clock a. m., or as soon thereafter as counsel can be heard, we shall present to the Honorable William M. Sparks, United States Circuit Judge, and the Honorable Charles E. Woodward and Honorable Michael L. Igoe, United States District Judges, the petition of the petitioner herein for an appeal from the final orders and decree made and entered in the District Court in the above entitled cause on the 27th day of June, 1940, to the Supreme Court of the United States, a copy of said petition for appeal and Assignment of Errors therein referred to being attached hereto; and ask that an order be entered herein allowing said appeal and making same returnable [fol. 89] within thirty (30) days from August 23rd, 1940, a copy of said order being also attached hereto.

Richard E. Westbrooks, Arthur W. Mitchell, pro se.,
Solicitors for Petitioner.

STATE OF ILLINOIS,
County of Cook, ss.:

AFFIDAVIT OF SERVICE

Hattie Mae Salone, first being duly sworn, deposes and says that at the request of the attorneys for the petitioner she served the above and foregoing Notice of Appeal, the Petition for Appeal and Assignment of Errors hereto attached upon the attorneys for all parties of record and who are named in the foregoing Notice of Appeal by placing a copy of the same in a sealed envelope with the proper amount of postage attached to said envelope and addressed to each of the attorneys for the parties of record in this cause as the names and addresses appear in the foregoing Notice of Appeal, and depositing each of the said envelopes

in the United States mail-box at 30th and State Street, Chicago, Illinois, on the 18th day of August, 1940.

Hattie Mae Salone, Affiant.

Subscribed and sworn to before me this 18th day of August, A. D., 1940. Birdie Lee James, Notary Public. (Seal.)

[fol. 90] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed August 23, 1940

To:

Honorable William M. Starks, United States Circuit Judge.

Honorable Charles E. Woodward and Honorable Michael L. Igoe, United States District Judges.

Now comes Arthur W. Mitchell, petitioner, by his solicitors and feeling aggrieved by the final order and decree of the District Court made and entered herein on to-wit, June 27, 1940, does hereby appeal therefrom to the Supreme Court of the United States and prays that his appeal be allowed and that citations be issued as provided by law.

The particulars wherein he considers the final order and decree erroneous are set forth in the Assignment of Errors on file, to which reference is made. He prays that a transcript of the record, proceedings and papers on which the final order and decree was made and entered, duly authenticated, may be transmitted to the Supreme Court of the United States, and he further prays that a proper order granting to him an appeal to the Supreme Court of the United States and relating to the security to be required of him be made.

Richard E. Westbrooks, Arthur W. Mitchell, pro se, Solicitors for Petitioner.

Dated the 18th day of August, 1940.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 23, 1940

Now comes Arthur W. Mitchell, petitioner herein, and presents with his petition for appeal herein this assign-

ment of errors and says that in the above entitled cause and the decree made and entered against him therein on the 27th day of June, 1940, there is error in the particulars hereinafter set forth.

The District Court for the Northern District of Illinois, Eastern Division, erred in making the final order and decree in this cause and in dismissing the petition herein for lack of jurisdiction at the costs of the complain-t in the following respects:

1. It erred in finding that the Commission's findings of fact were all supported by substantial evidence.

2. It erred in finding that the finding- of the Commission are not erroneous.

3. It erred in finding that the order of the Commission is not contrary to law.

4. It erred in finding that the order of the Commission contravenes no provisions of the Federal Constitution.

5. It erred in finding that the order of the Commission is supported by findings.

[fol. 92] 6. It erred in finding that the court was without jurisdiction to grant the relief sought in the complaint or any part thereof and that the complaint should be dismissed.

7. It erred in dismissing the cause for lack of jurisdiction at the costs of the complainant.

8. It erred in failing to find, as it should have done, that the plaintiff was an interstate passenger on the Rock Island Railroad, holding a first-class round trip ticket for which he had paid a first-class fare from Chicago, Illinois, to Hot Springs, Arkansas.

9. It erred in failing to find, as it should have done, that as such first-class passenger, making a continuous interstate journey and travelling in interstate commerce, that he was entitled to equal first-class accommodations and comforts identical with the first-class accommodations and comforts furnished all other white passengers holding first-class tickets and travelling in interstate commerce.

10. It erred in failing to find, as it should have done, that it was the lawful duty of the Rock Island to furnish to the plaintiff, as a first-class interstate passenger, such equal

accommodations and comforts as were furnished to first-class white passengers travelling on the same train as interstate passengers.

11. It erred in failing to find, as it should have done, that the Rock Island failed to furnish to the plaintiff such equal accommodations and comforts as was its lawful duty to so furnish but — the contrary, compelled the plaintiff to occupy, during a part of his interstate journey, second-class accommodations.

12. It erred in failing to find, as it should have done, that such conduct on the part of the Rock Island was in violation of the Interstate Commerce Act.

13. It erred in failing to find, as it should have done, that the Rock Island received from the plaintiff a first-class fare but compelled him to occupy second-class accommodations in violation of the Interstate Commerce Act.

[fol. 93] 14. It erred in failing to find, as it should have done, that the conductor of the Rock Island, in furnishing first-class accommodations to all white passengers holding first-class tickets and travelling as interstate passengers, and refusing to furnish the same to the plaintiff who held a first-class ticket and was travelling as an interstate passenger, was unduly and unreasonably prejudicial to him and was unduly and unreasonably preferential to the white passengers to the disadvantage of the plaintiff and violated the Interstate Commerce Act.

15. It erred in failing to find, as it should have done, that the Rock Island, in charging and receiving a greater compensation for services rendered in transporting the plaintiff as a first-class interstate passenger, than was charged and collected from other persons for doing for them a like and contemporaneous service, did unjustly discriminate against the plaintiff in violation of the Interstate Commerce Act.

16. It erred in failing to find, as it should have done, that the Rock Island, in receiving a charge from the plaintiff and contracting to furnish first-class accommodations and comforts during the entire interstate trip of the plaintiff from Chicago, Illinois, to Hot Springs, Arkansas, and in failing and in refusing to furnish such first-class accommodations, although such first-class accommodations were

available, was unjust, unreasonable, unlawful and in violation of the Interstate Commerce Act.

17. It erred in failing to find, as it should have done, that the conductor of the Rock Island, in having practiced unjust discrimination against all colored persons travelling in interstate commerce for the past 32 years has caused, is causing and will cause undue and unreasonable advantage to white persons and undue and unreasonable prejudice to the plaintiff and all colored persons travelling in interstate commerce and is in violation of the Interstate Commerce Act.

18. It erred in failing to find, as it should have done, that the conduct of the Rock Island towards the plaintiff as above set forth, is in violation of the 14th Amendment of the United States Constitution in denying to the plaintiff the equal protection of the law.

19. It erred in failing to find, as it should have done, that the conduct of the Rock Island towards the plaintiff as above set forth, is in violation of the statutes and laws enacted by the Congress of the United States, known as the Enforcement Act or Civil Rights Act.

20. It erred in failing to find, as it should have done, that it is a lawful duty which the Rock Island owes to white and colored passengers on this line, in interstate travel, to make them equal in comforts, accommodations, and equip-
[fol. 94] ment, without any discrimination where the same price is charged.

21. It erred in failing to find, as it should have done, that it is the lawful duty, which the Rock Island owes to the travelling public over its line, engaged in interstate travel, that its train officers should refrain from practices against all such passengers without regard to race, color or sex, which result in undue prejudice and disadvantage.

22. It erred in failing to find, as it should have done, that there is no equality of service, when the money of white first-class interstate passengers purchases luxurious accommodations and comforts and the same amount of money purchases for colored first-class interstate passengers inferior quarters on the same interstate journey.

23. It erred in failing to find, as it should have done, that common carriers are bound to provide for colored

interstate passengers, holding first-class tickets, accommodations and comforts precisely equal in all respects to those provided for white interstate passengers holding a similar ticket.

24. It erred in failing to find, as it should have done, that common carriers are bound to provide first-class accommodations and comforts to interstate passengers without regard to race or color as first-class interstate passengers have contracted and paid for.

25. It erred in failing to find, as it should have done, that the separate coach law of the State of Arkansas has no application to interstate passengers making a continuous journey in interstate commerce.

26. It erred in failing to find, as it should have done, that the plaintiff, as a native born citizen of the United States, was entitled to all privileges and immunities of citizens in the several States and a denial to the plaintiff solely on account of his color and race by the Rock Island, under a claim of custom or local State law, while all other white citizens under like conditions are granted the same privileges and immunity, is in violation of the Constitution of the United States.

27. It erred in failing to find, as it should have done, that the order entered by the Interstate Commerce Commission dismissing the proceedings filed by the plaintiff before the Interstate Commerce Commission and the findings upon which said order is based, are arbitrary and unjust.

[fol. 95] 28. It erred in failing to find, as it should have done, that said order and findings are contrary to the evidence of record.

29. It erred in failing to find, as it should have done, that said order and findings are without support of any substantial evidence in the record.

30. It erred in failing to find, as it should have done, that said order and findings are without support of any evidence in the record before the said Commission in the proceedings in which they were made.

31. It erred in failing to find, as it should have done, that said order and findings are against the indisputable character of and the manifest weight of the evidence.

32. It erred in failing to find, as it should have done, that in making the order and findings the Commission disregarded the undisputed and uncontradicted evidence contained in the record.

33. It erred in failing to find, as it should have done, that there are not findings of facts to support the order of the Commission.

34. It erred in failing to find, as it should have done, that the Commission proceeded under erroneous constructions of law and misapprehensions in respect of its powers.

35. It erred in failing to find, as it should have done, that said order and findings are contrary to the laws of the United States of America.

36. It erred in failing to find, as it should have done, that said order and findings conflict with the former decisions of the Interstate Commerce Commission in cases involving the identical situation as the case at bar.

37. It erred in failing to find, as it should have done, that said orders and findings are contrary to and conflict with the United States Constitution and all amendments thereto.

38. It erred in failing to find, as it should have done, that the order and findings of the Commission conflicts with and is contrary to the decisions of the Supreme Court of the United States, the United States Circuit Courts of Appeal and the United States District Courts, in cases involving the identical situation as shown by the undisputed and uncontradicted evidence appearing in the record.

[fols. 96-97] 39. It erred in failing to find, as it should have done, that said order and findings are contrary to and in conflict with the Enforcement Act or Civil Rights Act of the United States.

40. It erred in failing to find, as it should have done, that said order and findings are a denial of the plaintiff of the due process of law as guaranteed by the Fourteenth Amendment of the United State's Constitution.

41. It erred in failing to find, as it should have done, that said order and findings are a denial of the equal protection of the laws to the plaintiff as guaranteed by the Fourteenth Amendment of the United States Constitution.

43. That the order of the Interstate Commerce Commission and the judgment of the United States District Court are contrary to the basic principles upon which this government was founded and judicially approves unjust discrimination against a native born American citizen, solely on account of his race and color and said order and judgment is unjust and unamerican.

Wherefore, petitioner prays that the said order and decree entered herein on the 27th day of June, 1940, be reversed, and that the said District Court of the United States for the Northern District of Illinois, Eastern Division, be directed to enter a decree granting the prayer of the petition of the petitioner and that the said order of the Interstate Commission be declared void and perpetually set aside, suspended and annulled and that your petitioner may have such other and further relief as may be appropriate.

Richard E. Westbrooks, Arthur W. Mitchell, Pro Se., Solicitors for Petitioner, 3000 S. State Street, Chicago, Illinois.

[fols. 98-99] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING PETITIONER AN APPEAL TO THE UNITED STATES SUPREME COURT AND FIXING THE AMOUNT OF THE BOND—Aug. 23, 1940

Upon the entering of the final decree in this cause came Richard E. Westbrooks and Arthur W. Mitchell, pro se., solicitors for petitioner, and filed their Assignment of Errors and Petition for Appeal and it is hereby

Ordered that an appeal by the petitioner in the above entitled cause to the Supreme Court of the United States from the final order and decree heretofore filed and entered on June 27th, 1940, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States, said appeal be hereby made returnable thirty (30) days from the date hereof,

It Is Hereby Further Ordered that the bond of appeal be, and the same is hereby fixed in the sum of $300.00 Dollars.

Entered:

William M. Sparks, United States Circuit Judge;
—— ——, United States District Judge.

Dated August 23, 1940.

[fols. 100-106] Citation in usual form showing service on Daniel W. Knowlton, et al., filed Sept. 17, 1940, omitted in printing.

[fols. 107-129] In United States District Court

[Title omitted]

Order Approving Appeal Bond—Aug. 24, 1940

This cause coming on to be heard upon the motion of Richard E. Westbrooks and Arthur W. Mitchell, pro se, solicitors for petitioner for an order approving the Appeal Bond heretofore ordered in this cause, August 23rd, 1940, and it appearing to the court that the petitioner presents in open court a certified check dated August 23rd, 1940, drawn on the American National Bank & Trust Company of Chicago, payable to Hoyt King, Clerk of the United States District Court, in the sum of Three Hundred ($300.00) Dollars as security;

It Is Hereby Ordered that the Appeal Bond of Arthur W. Mitchell, be and the same is hereby approved and ordered filed;

It Is Further Ordered that the Clerk of this court, accept and receive the above mentioned certified check, which is to be cashed by the said clerk of this court and held as security under the terms and conditions contained in the said Appeal Bond of Arthur W. Mitchell, petitioner, until the further order of this court.

Entered:

—— ——, United States Circuit Judge; Holly, United States District Judge; —— ——, United States District Judge.

Dated August 24th, 1940.

[fols. 130-131] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—Sept. 21, 1940

On motion of the plaintiff and for satisfactory reasons appearing to the court, it is hereby ordered that,

The time for the docketing of this cause in the Supreme Court of the United States, pursuant to the appeal sued out; to present for approval the Narrative Statement of Evidence and to complete the preparation of the Transcript of Record for certification by the Clerk of this court,

be and is hereby extended to and including the 21st day of November, A.D. 1940.

Entered:

—— ——, United States Circuit Judge; —— ——, United States District Judge; Igoe, United States District Judge.

Dated this 21st day of September, A.D. 1940.

[fols. 132-133] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RE ORIGINAL EXHIBITS—Nov. 14, 1940

On motion of the plaintiff and for satisfactory reasons appearing to the court, It Is Hereby Ordered that,

a. The Clerk of this court include in the transcript of record, which is being prepared for use in the proceedings on appeal to the Supreme Court of the United States in this cause, all original exhibits which were introduced in the United States District Court on the hearing of this cause.

b. That Plaintiff Exhibit No. 1, (a), (b), (c), (d), (e), and Defendant's Exhibit No. 1, stand in lieu of a Narrative Statement of the Evidence and be so certified to the Supreme Court of the United States by Clerk of this court.

Entered:

—— ——, United States Circuit Judge; —— ——, United States District Judge; Igoe, United States District Judge.

Dated this 14th day of November, A.D. 1940.

[fols. 134-135] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RE TRANSCRIPT OF TESTIMONY—Nov. 14, 1940

Good cause appearing, it is ordered that a transcript of oral argument in this cause, presented before this Court on May 27, 1940, by counsel for the respective parties, be sent as an original exhibit to the Clerk of the Supreme Court of the United States and be included as part of the record herein on appeal.

Entered:

Igoe, Judge United States District Court.

Dated this 14th day of November, 1940.

[fol. 136] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 3, 1940

To the Honorable Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to a Notice of Appeal heretofore filed August 23, 1940 and to include in such transcript of record the following, and no other papers, to-wit:

(1) The process.

(2) The pleadings.

(3) Copy of petition, which shall include so much of the exhibits in accordance with the rules of the United States Supreme Court.

(4) Answer of United States of America.

(5) Answer of the Interstate Commerce Commission.

(6) Answer of Frank O. Lowden, James E. Gorman and James B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation.

(7) Answer of Pullman Company, a corporation.

(8) Answer of Illinois Central Railway Company.

(9) Order setting cause for hearing.

[fols. 137-138] (10) Narrative statement of evidence or agreed statement of fact. (See Order 11-14-40)

(11) Findings of fact, conclusions of law and Final Decree entered by the court June 27, 1940.

(12) Order approving narrative statement of evidence or agreed statement of fact. (See Order 11-14-40)

(13) Notice of Application for order allowing appeal.

(14) Petition for Appeal.

(15) Assignment of errors.

(16) Order allowing appeal.

(17) Citation on appeal.

(18) Bond on appeal.

(19) All orders, enlarging time for docketing cause in the United States Supreme Court and extending time to have approved the narrative statement of evidence in condensed form.

(20) Praecipe for record on appeal and proof of service thereof.

(21) Jurisdictional statement and proof of service thereof.

(22) Order certifying record to United States Supreme Court.

(23) All stipulations filed in said cause.

(24) All orders of the court entered subsequent to the entry of the decree and not heretofore requested herein.

Richard E. Westbrooks, Arthur W. Mitchell pro se,
Solicitors for Plaintiff.

[fol. 139] PLAINTIFF'S EXHIBIT No. 1

Interstate Commerce Commission

Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Complaint filed September 2, 1937;

Transcript of the stenographer's notes of the hearing held March 7, 1938, at Chicago, Ill., before Examiner W. A. Disque, and exhibits filed at said hearing;

Report proposed by Wm. A. Disque, Examiner, filed May 5, 1938;

Report and order of the Commission filed and entered November 7, 1938; and

Order of the Commission entered March 6, 1939,

in Docket No. 27844, Arthur W. Mitchell v. Chicago, Rock Island & Pacific Railway Company et al., the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 15th day of September, A. D. 1939.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fols. 140-149] Complaint omitted. Printed side page 7 ante.

[fol. 150] Before Interstate Commerce Commission

Docket No. 27844

Arthur W. Mitchell

vs.

The Chicago, Rock Island and Pacific Railway Company, (F. O. Lowden, J. E. Gorman and J. B. Fleming, Trustees), et al.

Chicago, Illinois, March 7, 1938. 10 a. m.

Before W. A. Disque, Examiner

Met pursuant to notice.

Appearances:

Richard E. Westbrooks, 3000 South State Street, Chicago, Illinois, appearing for complainant.

Arthur W. Mitchell, 3000 South State Street, Chicago, Illinois, complainant, appearing pro se.

Daniel Taylor and Wallace T. Hughes, 1025 LaSalle Street Station, Chicago, Illinois; appearing for the Chicago, Rock Island and Pacific Railway Company (Frank

O. Lowden, James E. Gorman, and Joseph P. Fleming, Trustee).

Erwin W. Roemer, Charles S. Williston, and Lowell M. Greenlaw, 79 East Adams Street, Chicago, Illinois, appearing for The Pullman Company.

[fol. 151] H. J. Deany and R. Mitten, 135 East 11th Place, Chicago, Illinois, appearing for Illinois Central Railroad Company.

[fols. 152-153] PROCEEDINGS

Exam. Disque: Come to order, please.

The Interstate Commerce Commission has assigned for hearing at this time and place, Docket No. 27844, Arthur W. Mitchell against Frank O. Lowden, et al., Trustees of The Chicago, Rock Island & Pacific Railway Company, and other carriers.

Who appears for complainant?

Mr. Westbrooks: Richard E. Westbrooks, for the complainant; and Arthur W. Mitchell, pro se.

Exam. Disque: Who appears for defendants?

Mr. Hughes: Daniel Taylor and Wallace T. Hughes, 1025 LaSalle Street Station, Chicago, for The Chicago, Rock Island & Pacific Railway Company, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees.

Mr. Roemer: Erwin W. Roemer, Lowell M. Greenlaw, and Charles S. Williston, Chicago, Illinois, appearing for The Pullman Company.

Mr. Deany: H. J. Deany, and Robert Mitten, Chicago, Illinois, appearing for the Illinois Central Railroad Company.

Exam. Disque: Does anyone else appear?

(No response.)

Exam. Disque: You may proceed, Mr. Westbrooks.

Mr. Westbrooks: First, before we proceed, if the Examiner please, I presume that it is proper and fitting, for the purpose of the record if nothing more, that I call your [fol. 154] attention to the fact that I have received for the first time a copy of the answer of The Pullman Company, and we are making no objection on account of receiving it now for the first time.

I want the record to show that.

Exam. Disque: You mean, you just received it today?

Mr. Westbrooks: Just received it today.

Exam. Disque: All right.

Mr. Westbrooks: At the hearing here.

With respect to the answer of Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the estate of The Chicago, Rock Island and Pacific Railway Company, I want to make a motion to strike their answer.

Now, I appreciate that these hearings are not to a great degree, technical, but that they are somewhat informal. However, under the pleadings prescribed by this Commission, I think that they have failed to conform.

I particularly refer to page 43 of the rules of the Commission, promulgated and revised April 1, 1936,—that is, page 23, paragraph (d), which says:

"All answers should be so drawn as fully and completely to advise the parties and the Commission of the nature of the defense, and should admit or deny specifically and in detail each material allegation of the pleading answered."

[fol. 155] Section (e) which should be read in connection with Section (d), concerning answers, of the rules of practice, is entitled "Denials of violations of Section 2 or 3"—that is, of the act. It provides:

"An answer denying that an alleged discrimination is unjust, under Section 2 of the act, or that an alleged preference or prejudice is undue, or unreasonable, under Section 3 of the act, should state fully the grounds relied upon in making such denial."

Now, as I said, it is not merely for technical reasons, but I do not think that the Lowden answer complies, or attempts to comply with fully giving their defense.

Now, the answer, of course, speaks for itself, and I presume that rather than to—it is only for the purpose of saving that point, that is, as to the insufficiency of the answer, that I desire to make that motion.

Exam. Disque: All right.

Mr. Westbrooks: Our motion is noted on the record.

Exam. Disque: Your motion will be given consideration.

We will proceed with the first witness.

Mr. Greenlaw: If the Examiner please, may I state, if you please, in answer to the statement of the attorney for the complainant, concerning the answer of The Pullman

Company, that I hold in my hand our file copy of my letter of September 22nd, addressed to Mr. Arthur W. Mitchell, and Mr. Richard E. Westbrooks, 417 East 47th Street, Chi-
[fol. 156] cago, stating that I am enclosing a copy to each of them of the answer.

That was the same date that the answer was filed with the Interstate Commerce Commission. In our letter to the Commission, I stated that copies were being served upon other parties.

Possibly it may have gone astray in the mails, but I just wanted the record to show that the answer had been sent in due form.

Exam. Disque: All right.

Mr. Westbrooks: Now, I think that the issues here are very simple, as to whether or not the acts which we have alleged in our complaint, violated the sections of the Interstate Commerce act which we have alleged in our complaint.

I do not think that there are any money demands asked, or any reparation for the violations; that is, the violation of the excess fare, charging a fare for first class service, and then the complainant only receiving that first class service a part of the way, and being compelled to receive second class service from Memphis, Tennessee to Hot Springs, Arkansas, after having paid the first class fare.

The second class accommodations, I believe, we have specifically described, as to the condition of the second class car, commonly called a Jim Crow car in the south.

The issue here is as to whether or not they can compel a passenger who has paid the first class fare for accommo-
[fol. 157] dations in interstate commerce to be—well, put out, thrown out, asked out, or removed, either way we want to put it, out of the first class accommodations, before he reaches the end of his journey, over his protests and against his will; and be compelled to continue to the end of his journey in second class accommodations and facilities.

Now, we will proceed with the evidence. I think those are the issues, briefly stated.

Call Congressman Mitchell.

Exam. Disque: Be sworn, please, Congressman Mitchell.

ARTHUR W. MITCHELL was sworn and testified as follows:

Direct examination.

By Mr. Westbrooks:

Q. State your name, please.

A. Arthur W. Mitchell.

Q. Your address?

A. 3806 South Parkway, Chicago, is my home address.

Q. What is your business, sir?

A. I am a lawyer; at the present time member of the Congress of the United States.

Q. And you have been a member of the Congress of the United States for how long, sir?

A. Since—I took a seat in the Congress on the 3rd of January, 1935, and I have been a member since.

I am now serving my second term in Congress.

[fol. 158] Q. Calling your attention, sir, to April the 20th, 1937, did you have occasion to see, or were you in Chicago at that time?

A. I was in Chicago on April 20th, 1937. I left Chicago the evening of April 20th on a trip to Hot Springs, Arkansas.

Q. And did you make arrangements for that trip, sir, yourself in person?

A. I did.

Q. What arrangements did you make for the trip to Hot Springs?

A. During the day of the 20th I believe—or the 19th, I called the Illinois Central office and made a reservation for the trip.

I tried to get a bedroom, and they did not have a bedroom that was going all the way to Hot Springs, that was not then engaged; but they did provide me with a bedroom over the Illinois Central to Memphis, Tennessee.

I bought a first class ticket, a part of which ticket is here now, that I did not use, the return part of the ticket, after this thing happened. I have here the return part of the ticket that I bought to Hot Springs, Arkansas, from Chicago.

Q. Now——

A. (Continuing) Then I bought the bedroom from here to Memphis, and I have the stub for that bedroom.

Before I got to Memphis, I knew that the car that I was

in would not go to Hot Springs, but there was a car attached to that train that I was informed would go to Hot Springs.

[fol. 159] I had the porter of the particular car that was to go—that I was informed would go to Hot Springs, come back to my reservation on the car in which I had traveled to Memphis—or, I was at that time perhaps 8 or 10 miles out from Memphis; and he took my baggage, consisting of two suit cases, a large handbag, brief case and a small handbag, raincoat, topcoat, and umbrella, and conveyed them up to a seat in the car that would go to Hot Springs, and assigned me to that car.

Q. Now, may I ask you this question at this point, sir: you paid for your railroad ticket, did you?

A. Yes.

Q. How much did you pay for your railroad ticket?

A. I have the figures here.

Q. What did it cost you?

A. I find, taking the memorandum I made when I called up, that I paid $27.70 for the railroad ticket.

Q. And did the Illinois Central agent from whom you purchased the ticket in Chicago here to Hot Springs, Arkansas, inform you whether that was a first class or second class ticket, sir?

A. I called for a first class ticket, and this is what he gave me, and it is marked that way, "First Class."

Q. That was a first class round trip ticket?

A. Yes, sir.

Q. From Chicago, Illinois, to Hot Springs, Arkansas?

A. Yes, sir.

[fol. 160] Q. And return.

A. Yes.

Q. By way of Memphis, Tennessee; is that correct?

A. Yes, sir,—returning over the Rock Island and Illinois Central to Chicago.

Mr. Westbrooks: I ask that the ticket be marked as exhibit No. 1 for the complainant.

Exam. Disque: He has never turned that in, for a refund, has he?

Mr. Westbrooks: No, he has not. We are still entitled to a refund.

The Witness: I thought it was worth more in a hearing like this than it would be to turn it in.

Exam. Disque: Mark it Complainant's Exhibit No. 1 for identification at this time.

(Complainant's Exhibit No. 1 marked for identification.)

Mr. Westbrooks: Is there any objection? I show it to counsel. Is there any objection?

Mr. Taylor: No objection.

Mr. Westbrooks: If there is no objection, if the Examiner please, I offer in evidence Complainant's Exhibit 1.

The Witness: I have a photostatic copy of that.

Mr. Westbrooks: I will ask leave to file a photostatic copy in lieu of the original, and withdraw the original at this time.

[fol. 161] The Witness: This is a photostatic copy.

Exam. Disque: Let us put the photostatic copy in, as the one for the record. Then you can keep your own ticket.

Mr. Westbrooks: Is there any objection to the photostatic copy?

Mr. Hughes: No.

Exam. Disque: It is received as Complainant's Exhibit No. 1.

(Complainant's Exhibit No. 1, witness Mitchell, received in evidence.)

Mr. Westbrooks: This original having been admitted, I ask leave to withdraw it and substitute a photostatic copy therefor.

Exam. Disque: No, you have offered the copy now, as I understand it.

Mr. Westbrooks: Yes.

Exam. Disque: That will be the one that will go into the record.

By Mr. Westbrooks:

Q. Now, then, the Pullman ticket: referring to the Pullman ticket, which you purchased, sir, do you recall what you paid for that ticket?

A. I paid for the Pullman ticket, $7.50, and then I had to pay an additional $1.65 because I occupied this room alone.

Q. I see. Now, then, that was paid also at the Illinois Central station——

[fol. 162] A. Yes, sir.

Q. —here in Chicago, was it?

A. Yes, sir.

Q. A total of how much?

A. The total amount paid was $36.85.

Q. And that was to the ticket agent here, at the Illinois Central station, in Chicago?

A. Yes, and those are his figures, made on this envelope. This is the envelope he gave me at the time when I made the purchase.

Those are his figures.

Mr. Westbrooks: Mark this for identification, please, Complainant's Exhibit 2.

(Complainant's Exhibit No. 2 marked for identification.)

Mr. Westbrooks: I am introducing now stub for Pullman accommodations from Chicago to Memphis, Tennessee—just a moment. I wanted to call attention to the number of the ticket.

By Mr. Westbrooks:

Q. The original railroad ticket is No. C-2649?

A. Yes, sir.

Q. Showing the unused portion of the ticket from Memphis back to—from Hot Springs to Memphis, and Memphis to Chicago?

A. That is the unused portion, yes.

Mr. Westbrooks: This Pullman ticket is No. 0-5, it looks like—0-51, or 951——

[fol. 163] Mr. Greenlaw: 951.

Mr. Westbrooks: 951, from Chicago to Memphis, compartment C, car 227, for one passenger, marked April 20th, 1937, from Chicago.

I now offer in evidence, if there is no objection, a photostatic copy. Have you a photostatic copy of that?

The Witness: Yes, sir, I have a photostatic copy of that. These exhibits go to Washington, as I understand it.

Exam. Disque: Yes. When anything once gets into the record, it has to stay there, for our permanent record.

(Complainant's Exhibit No. 2, witness Mitchell, received in evidence.)

By Mr. Westbrooks:

Q. When you said, a bedroom, that was compartment C, as indicated by this ticket?

A. Yes. I refer to a compartment, not a bedroom. There is a difference between a bedroom and a compartment.

Q. Yes.

A. This happens to have been a compartment.

Q. Yes.

A. (Continuing:) And I think it is so marked on the memorandum that I used—let me see that just a moment, please. You can see it is marked "Compartment C, Car 277, Illinois Central Railroad."

Then, they charged me $1.65, and the round trip ticket of $27.70.

This is the memorandum I made over the telephone.

By Mr. Greenlaw:

Q. That is, the railroad ticket?

[fol. 164] A. Yes, sir. Those figures were made before I came down to pick up my reservation; made in my office here.

By Mr. Westbrooks:

Q. Now, sir, after you had paid, at the Illinois Central Railroad station here, for your Pullman accommodation and your railroad ticket, did you occupy that Pullman—you occupied that compartment you said as far as Memphis—or as far as near Memphis, Tennessee?

A. Yes. I would say I occupied it to within 5 or 6 miles, maybe 10 miles, of Memphis.

Q. Were other first class passengers riding in that Pullman?

A. Oh, yes, there were other passengers who had space in the same car.

Q. Now, then, you said that just before you reached Memphis, I believe, something happened.

What did you say happened?

A. I had the porter of this car—I talked with him, and I knew this car was not going through to Hot Springs, but there was a car that would go through attached to this train; I asked him to get the porter of that car that would go through to Hot Springs, and have him come back and let me make a reservation.

He told me that car would be in charge of that porter; there was no Pullman conductor that would go through on this train.

This porter did come back—oh, I should say anyway 7 or 8 or maybe 10 miles out from Memphis, and he said [fol. 165] they had plenty of space in the car; he made two or three trips and conveyed all of my baggage to this car; and then took me to the car and assigned me space which he told me I could occupy; and he said he would pick up the fare as soon as we left Memphis.

Q. Now, then, you left Chicago what time on that date, sir?

A. 6:05, I believe was the time. That is the time I have designated here. I am not sure about the time.

Q. 6:05?

A. In the afternoon.

Q. On Train No. 3, leaving here at 6.05 p. m.

A. Yes, sir.

Q. And you arrived at Memphis, Tennessee, the next morning about when?

A. Somewhere around 8:00 o'clock.

Q. About 8:00 or 8:20 on train daily No. 3, called the Louisiane?

A. Yes, sir.

Mr. Westbrooks: Mr. Reporter, please mark this Complainant's Exhibit No. 3 for identification.

(Complainant's Exhibit No. 3, marked for identification.)

By Mr. Westbrooks:

Q. I will show you Complainant's Exhibit No. 3 for identification. Is that one of the folders which you received at the Illinois Central Station at the time you bought your tickets?

[fol. 166] A. I received a folder like this. I did not mark it. I could not designate it as being exactly the one, but I received one that was given me, the time table that was given me at that time.

Q. A time table?

A. Yes, sir.

Q. And this is for December 31, 1936.

A. Yes, sir.

Mr. Westbrooks: I will ask to have this marked in evidence as Complainant's Exhibit No. 3, for the purpose of showing train daily No. 3, called the Louisiane, as the train leaving Chicago, that has been referred to.

Mr. Taylor: No objection.

Mr. Roemer: No objection.

Mr. Westbrooks: I offer in evidence Complainant's Exhibit No. 3, to show that this is the time table, issued December 31, 1936, of the Illinois Central System, showing that there was a train leaving at 6:05 called the daily Louisiane, Chicago to Little Rock and Hot Springs.

Exam. Disque: Just a moment. Exhibit 3 is received in evidence.

(Complainant's Exhibit No. 3, witness Mitchell, received in evidence.)

Mr. Westbrooks (Continuing): It is mentioned on page 2, of this Complainant's Exhibit 3, showing that it leaves, [fol. 167] 6:05, Chicago, Illinois, and arrives in Memphis, Tennessee at 8:20, and that it connects with the Chicago, Rock Island & Pacific at Memphis, Tennessee, train 45, at 8:30 a. m., due in Hot Springs, Arkansas at 1:05 p. m.

Now, it also shows, and I am particularly calling attention to page 5 of this Louisiane time table, which shows the passenger train equipment.

It shows that there were sleepers, Chicago to New Orleans and Houston, Texas; a 10-section drawing room, connecting with S. P. No. 3, New Orleans to Houston; Chicago to Hot Springs, Arkansas, a 10-section, 2-compartment drawing room which connects with Rock Island No. 45 at Memphis, Tennessee, to Hot Springs, Arkansas; also Cincinnati & Louisville to New Orleans, a 10-section, 2-compartment drawing room, connecting with B. & O. No. 63 at Cincinnati, to Louisville, and 103, Louisville to Memphis, No. 3 to New Orleans; Louisville to Paducah, Kentucky, a 12-section drawing room.

It also shows that this train had diners, air-conditioned, and that the regularly-assigned cars as described in this train, were air-conditioned; diners from Chicago to Carbondale, Illinois, and Fulton, Kentucky to New Orleans.

There was a buffet-lounge car, air-conditioned, radio, Chicago to New Orleans; chair cars, air-conditioned, Chicago to New Orleans; and coaches, air-conditioned.

By Mr. Westbrooks:

[fol. 168] Q. Well, now, you said you were in one of these cars, these Pullman cars, first class accommodation, out of Chicago, in accordance with the ticket which you had?

A. Yes, sir.

Q. (Continuing:) And the extra fare which you paid, to occupy that compartment as one passenger?

A. Yes, sir.

Q. Now, then, after the porter—you said the porter moved your luggage?

A. Yes, sir.

Q. From the Pullman car in which you were riding, to another Pullman car on that train?

A. Yes, sir.

Q. Which was going to Hot Springs, Arkansas.

A. Yes, sir.

Q. The Pullman which your baggage was moved into just before you reached Memphis: will you describe that, sir?

A. Describe the car?

Q. Yes, describe the car.

A. Well, it was just an ordinary Pullman car. I think you read a description of the cars, a moment ago, when you were reading from the booklet.

It had several sections, and a drawing room, I know; I don't know how many, but I know it had one. It had a smoker for the men; running water.

I went into the smoker, and smoked, and it had all of the [fol. 169] accommodations, it seemed to me that a Pullman car, any Pullman car ordinarily has, except I don't think it had bedrooms, except it had sections.

Q. I see. Now, what about the upholstery in the two Pullman cars in which you rode?

A. The upholstering in the Pullman car to which I was transferred compared favorably with the upholstering of the Pullman car that I was transferred from.

Q. Was the upholstering clean?

A. It was. It had clean linen, and everything in the way of accommodations that Pullman cars ordinarily carry.

Q. Porter service?

A. Yes, sir.

Q. In both of the Pullmans?

A. Both had porter service, and were both air-conditioned.

Q. Both air-conditioned.

A. Yes, sir..

Q. And with soap—what kind of soap?

A. They were equipped with soap, as Pullman cars ordinarily are.

Q. Of high quality?

A. High quality. I don't think the Pullman Company uses other than that.

Q. And was there——

Mr. Taylor: Unless he is an expert on soap, your Honor, [fol. 170] how does he know?

Mr. Roemer: We do not object, your Honor; the Pullman Company is not objecting.

By Mr. Westbrooks:

Q. Now, the toilets were clean?

A. Yes, sir.

Q. Running water?

A. The toilets were clean, and had running water, yes, sir.

Q. What about the wash bowls?

A. They were supplied—those Pullman cars were both equipped with washbowls and clean towels.

Q. Hot and cold water?

A. Mirrors; hot and cold water.

Q. What about the flushing, the water for flushing purposes in the toilets of the two Pullman cars in which you were?

A. Why, I would say that they both were properly equipped for that purpose.

Q. With plenty of water for flushing purposes?

A. I use Pullman cars quite often, and they were equipped the same as all Pullman cars I have had occasion to use.

Q. What about disinfectant in the toilets?

A. Well, there were no obnoxious odors; they were properly disinfected, if I were to judge from the absence of obnoxious odors.

Q. Now, you said you changed into this Pullman car, and you rode into Memphis, Tennessee, in this Pullman car, the [fol. 171] car designated for Hot Springs, Arkansas?

A. Yes, sir.

Q. Then, what happened, if anything?

A. Well, nothing happened until after we left Memphis

Q. All right.

A. After we left Memphis, and had gotten a little distance, the conductor, the train conductor and the Pullman porter came to me together; and when I offered my ticket, the train conductor took my ticket and tore off a piece of it, but told me at that time that I couldn't ride in that car.

He first spoke to the Pullman porter; he said, "This man can't ride in this car."

Q. That is, the train conductor on the Rock Island?

A. Yes, sir.

Q. That is, leaving Memphis?

A. Yes, sir.

Q. Having left Memphis, Tennessee, you crossed into Arkansas?

A. Yes, we were in Arkansas; we had crossed the river, I believe, when this took place.

Q. Yes.

A. (Continuing) We had gone maybe a distance of 4 or 5, or maybe 6 or 7 miles; about the time for him to come on and pick up tickets. We had quite a little controversy about it, and when he said I couldn't ride there I thought it might do some good for me to tell him who I was. I said, [fol. 172] "I am Mr. Mitchell, serving in the Congress of the United States." He said it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in that car.

Q. Did you say, the porter was in charge?

A. The porter—the Pullman porter was doing all he could to make it so that I could ride in the car. He even went—after the conductor and I had had a squabble that lasted I would say three or four, or maybe five minutes, in a very arrogant and nasty manner, and he told me that I had better get out of that car, and had better be gone when he came back, for a moment I decided that I wouldn't go, that I would let them put me in jail down there and see how the thing would finally come out.

But I happened to think that I was in Arkansas, and sometimes they don't keep them in jail for trial down there, but they take them out and lynch them after they put them in jail; so I thought maybe I had better not; being the only negro in Congress, that I had better not be lynched on that trip.

So I then held my seat until the porter came back again, and I said to the porter, "Well, suppose you go up and talk

with the conductor, and see if you can't arrange for me to ride in the smoking car. There is nobody occupying it."

Q. In the Pullman car, do you mean?

A. In the smoker of the Pullman car; that there was nobody in it. And there was at least several places—I would say there were at least four or five sections,—that [fol. 173] meant, the seats turning front and back—that nobody occupied.

Q. With no passengers in them?

A. No passengers,—except the baggage.

Q. Yes.

A. And one or two other people. There was a white man to the right of me, and in front of me, riding there, who gave some attention to this little fracas, but he didn't say anything about it.

Q. And it was in the presence of those other passengers that this conductor used that language?

A. Yes. The other passengers heard and saw the little controversy that was going on, and they were watching, looking on with interest; but the car was not crowded.

And then I rode until we got, I would say, 10 or 15 miles, probably, up the road; and the Pullman porter came back and said, "Well, I just can't do anything with this man. He says, you can't ride"——

Q. Referring to the conductor?

A. Yes, sir. "He says you can't ride in the smoker." And he said, "I know who you are, and I hate to do it, but I am helpless." And I told him,—I said, "I think I should let them put me in jail"—the conductor had told me, "In Arkansas, they will put both of us in jail and fine us $50 apiece."

I said to him, "I have my $50, and I hope you have yours, because I don't mind going to jail about a matter like this, [fol. 174] if you insist I must go."

Now, when I went out of this car, after we had gone a certain distance, and the Pullman porter was terribly excited himself about it, I decided that I would go up into the Jim Crow car, and I did; but my baggage went to Hot Springs in this Pullman car.

I couldn't go in it, but my baggage, my overcoat—that is, my topcoat, my raincoat, my umbrella, my brief case and all of my baggage went on to Hot Springs in this car.

Q. Now——

A. It wasn't transferred at all.

Q. Now, did the train conductor who had taken up part of your first class ticket, at any time offer to refund you any of the fare that you had paid for first class accommodations?

A. No. He kept—he had no business to take the ticket; he should have punched the ticket and left it with me; but he was excited, and tore a piece off of the ticket and kept it until we got half way, I would say, maybe half way to Little Rock.

Then he came back and asked to see my ticket again, and with some hesitancy I showed it to him, and what he did was to pin back on my ticket the piece that he had torn off; and he told me that I could get a refund on it.

He said, "Of course, this ticket entitles you to have first class accommodations, but under the law of the state of [fol. 175] Arkansas, you can't have them, and they have the right to give you back the difference between the price of the ticket and a regular coach ticket."

And that piece of the ticket which he tore off, was taken up; they changed crews at Little Rock, and that piece of a ticket which he had torn off was again taken up after I left Little Rock.

Q. Now, then, did you offer to pay for the extra accommodations, that is, the seat and the use of the Pullman car?

A. Yes. I had the money in my hand when I offered the ticket, to pay for this Pullman accommodation, on to Hot Springs.

Q. And they refused to accept it?

A. Yes, sir.

Q. Now, then, after he told you that there were no first class accommodations, but that it was a first class ticket, and you were entitled to first class accommodations, after you came into the state of Arkansas, what kind of accommodations did he tell you you could get,—the only kind?

A. He didn't tell me; he didn't say anything about it. He told me that I would have to ride in the Jim Crow car.

Q. Now——

A. (Continuing) He told me that before I left, before I left that Pullman.

Q. Yes. Now, then, you protested about being put out of there, did you not?

[fol. 176] A. Yes, sir, and he threatened to have me arrested.

Q. Now, then, will you describe this Jim Crow car that you have referred to, that you were compelled to complete your journey in?

A. Yes. The Jim Crow car was an old car up next to the engine, in front of all the other passenger cars. As I remember it, was divided into three, or into two—either two or three compartments.

A part of it was used for smoking passengers, a small section of it; separated by partitions, and by a door,—I don't remember whether it was a swinging door, or just an ordinary door; and a separate section of this car was used for nonsmoking passengers, men and women.

The car was in filthy condition. It was old and poorly ventilated; no linen of any kind; no running water; a filthy toilet that emitted obnoxious odors; no washbowl or any convenience where a man or woman could wash their hands; no towels or linen of any kind; and no soap.

Q. And did you have——

A. (Continuing) And offensive-smelling spittoons. Part of this Jim Crow car was used by the conductor; he used two seats of it for his office. In fact he and his flagman, his white flagman, used two seats of that part—not the part that was set aside for smokers, but the part that was set aside for the nonsmoking passengers. He rode just across [fol. 177] the aisle from where I sat all the way into—this same conductor, all the way to Little Rock.

Q. Now, what about the ventilation in the Jim Crow car?

A. Well, the ventilation was the type that they had in the old-fashioned cars. You could get ventilation—they had some arrangement for ventilation at the top.

Q. Well, was it well-ventilated; was it air-conditioned?

A. Oh, no.

Q. Well, was there——

A. (Continuing) It wasn't air-conditioned at all. It was merely—that car was built before they knew anything about air-conditioned cars, I think.

Q. Now, then, was there any hot and cold water for use in that part of the car, in the Jim Crow car, where you were compelled to ride?

A. No, sir, there was not.

Q. Was there any water for flushing the toilet?

A. If there was, the toilet was out of commission, and it could not be flushed that morning, because it was giving off a terrible odor.

It might have been due to something caught up above, I don't want to say it wasn't; my recollection isn't clear on that, but I know it wasn't possible to flush it that morning.

Q. Well, can you state what was the condition—after you entered this Jim Crow car, was the toilet flushed or cleaned [fol. 178] out at all, from the time you went in there?

A. It was not.

Q. And it was filled with offal, was it?

A. Yes, sir.

Q. Were there ladies in that portion of the Jim Crow car where you were?

A. There was one or two ladies who got on at different points, got on and off that train. This little Jim Crow section wasn't crowded at any time.

Q. Well, did they have any separate toilets for men and for women in this Jim Crow car, which colored ladies and colored gentlemen could use?

A. I believe in this one they did. Ordinarily they do not. In a great many of them, in the south, they do not have them separated. I was down south two weeks ago——

Mr. Taylor: If the Examiner please, I object.

Exam. Disque: Yes.

Mr. Taylor: Let him confine himself to this transaction.

Exam. Disque: Tell us about this one.

Mr. Westbrooks: Yes.

A. (Continuing) As to this one, I am not certain whether there were two toilets, or one. I know there was only one in the compartment where I was riding.

By Mr. Westbrook:

Q. One.

A. There might have been one in the little section set off [fol. 179] for smoking passengers.

Q. I mean in this compartment where ladies were riding.

A. There was only one toilet in that compartment.

Q. Now, this smoking compartment, this other compartment, you say, of this same car—that part of this car, you stated, was used as a smoker?

A. Yes, sir.

Q. For white or colored passengers?

A. Colored.

Q. And you were——

A. Of course there were white in it, too, but I think the purpose of it was—it was designated for colored, but there were white riding in it.

Q. Did they have any signs in this portion of the car that you were riding in "For Colored" or "For Negroes"?

A. I think they had a sign "For Colored."

Q. I see. Now, then, you said that this train conductor had charge of that train?

A. Yes.

Q. From Memphis to——

A. Little Rock.

Q. —to Little Rock.

A. Yes, sir.

Mr. Westbrooks: Mr. Reporter, please mark this Complainant's Exhibit 4 for identification.

[fol. 130] (Complainant's Exhibit No. 4 marked for identification.)

By Mr. Westbrooks:

Q. Now, then, showing you Complainant's Exhibit 4 for identification, purporting to be a time table, Rock Island time table, corrected January 24th, 1937; I will ask you if that is one of the Rock Island folders which you used, or which you received from the Rock Island?

A. Yes, sir.

Q. Covering that train service?

A. Yes, sir.

Mr. Westbrooks: Is there any objection to this Rock Island folder?

Mr. Taylor: No, none.

Mr. Westbrooks: There being no objection, I offer in evidence as Complainant's Exhibit No. 4, Rock Island time table. The exhibit shows on page 6, equipment of through cars.

Exam. Disque: Complainant's Exhibit No. 4 is received in evidence.

(Complainant's Exhibit No. 4, witness Mitchell, received in evidence.)

By Mr. Westbrook:

Q. Calling your attention to page 6 of this exhibit,—equipment, through cars—it shows on this train 45, called

the Chicago-Hot Springs Limited, which was referred to in exhibit 3, of the Illinois Central, daily observation parlor car. It shows observation parlor car from Memphis to Hot [fol. 181] Springs. Were you permitted to ride in that observation parlor car, sir?

A. I was not.

Q. You had the fare?

A. Yes, sir.

Q. And you were ready to pay for it, were you, sir?

A. I was ready to pay for it, yes, sir; I offered to pay for it.

Q. You were ready, willing and able to pay?

A. Yes, sir.

Q. To ride in the first-class coaches or cars?

A. Yes, sir.

Q. You saw other first-class passengers riding in them, did you?

A. Yes, sir.

Q. What were they, colored, or white?

A. White.

Q. Did you see any colored people at all riding in that observation car as passengers?

A. I did not.

Q. Now, they have a sleeping car, Memphis to Hot Springs, 10 sections, one drawing room and two compartments, from Chicago, Illinois Central No. 3. That was the car you were requested by the conductor, to move from; is that correct?

[fol. 182] A. That is the car I was ejected from.

Q. Did you see any colored people riding as passengers in that car, sir?

A. No, sir, I was told by the conductor that they could not ride in it, and because I was colored, I could not ride in it.

Q. And was that the only reason he told you you could not ride in there?

A. Yes, sir.

Q. Because you were colored?

A. Absolutely.

Q. Now, then——

A. (Continuing) Well, he said this; he said "The law of Arkansas has made it a crime for a negro to ride in a car of that type, in the presence of white people"; and that they would have to ride in compartments, or in drawing rooms;

that they couldn't ride in the car. This car that I was in, as a further description of it——

Q. You mean, the sleeping car, now?

A. Yes.

Q. Yes.

A. From which I was ejected.

Q. Yes.

A. (Continuing) —was of the modern type, with those separations between the sections. It was not the old type, where they used to put up ordinary wooden boards between [fol. 183] the sections when they got ready to make down the berths.

It was one of the modern steel cars, with these sections that stay permanently fixed, with these separations, or those partitions, that are permanently fixed between the sections; and I always rode in a section. I was trying to buy a section at the time when they ejected me, so I wouldn't have contact with anybody else.

Q. Now, after you said you told him that you were ready to pay the difference for the accommodations in the smoker of this particular car——

Mr. Taylor: If the Examiner please, I hate to annoy counsel, but I would like to suggest, it appears to me that he has been doing a good deal of testifying as we go along. I think it would be better, if he would put his questions in question form, and let the witness answer them.

Mr. Westbrooks: I agree with counsel, and there will be no objection to that.

By Mr. Westbrooks:

Q. Now, then, as to the coach from Chicago to Memphis, on the Illinois Central, No. 3, and from Memphis to Hot Springs; that was on car 45, equipment on car 45?

A. Train 45, you mean.

Q. Train 45.

A. Yes, sir.

Q. Yes. Now, calling your attention to page 12 of Complainant's Exhibit No. 4, I wish to—that is, page 12, which is [fol. 184] entitled, "Changing class of tickets", it says:

"Passengers holding coach tickets (not special coach) who desire to use sleeping car or parlor car may have their rail tickets made valid for passage in sleeping cars or

parlor cars, on payment of difference between the one way first-class rail fare and the one way coach fare applying between the points between which sleeping or parlor car service is available of.

"Approximately the same charge will be made on intermediate class tickets, when standard sleeping cars, or parlor cars are used.

"In addition, passengers will be charged the sleeping car or parlor car rate for the space occupied.

"Tickets designated 'special coach' will not be honored in sleeping cars or parlor cars, under any circumstances."

Calling your attention to page 24, of this table No. 5, Complainant's Exhibit No. 4, it shows this train that left Memphis at 8:30 in the morning 45-51, advertised as "Route of the Memphis-Californian" was, a through train from Memphis, Tennessee, through Little Rock, Oklahoma City, Amarillo, Tucumcari, El Paso, Los Angeles.

You reached—you arrived at Hot Springs about what time that next day, sir?

A. Sometime around 1:00 o'clock in the afternoon.

Q. About 1:05, was it?

[fol. 185] A. Yes, sir.

Q. This exhibit No. 4 shows this train leaving Memphis at 8:30 a. m., arriving at 1:05 at Hot Springs, Arkansas.

Now, calling your attention to page 32 of your exhibit No. 4 of the complainant, it also again mentions changing the class of tickets from a coach ticket to a first class ticket by paying the difference in fare, and reads as follows:

"Changing class of tickets.

"Passengers holding coach tickets (not special coach) who desire to use sleeping car"—I believe that is the same as was read heretofore.

I am calling attention to that to show the two different classes of tickets used at that time.

A. Also on page 33—may I interrupt?

Exam. Disque: Yes.

Mr. Westbrooks: Just a moment, please.

The Witness: I beg your pardon.

By Mr. Westbrooks:

Q. (Continuing) Now, calling your attention to Pullman car rates on page 33, it provides that if a person has only

one ticket, there is an extra fare, or that is, an additional charge for the occupancy of a compartment.

The sleeping car fares on page 33, that I call attention to, are advertised in this complainant's exhibit 4.

Now, sir, state what was the condition of your health at that time, that you were ejected from this sleeping car, [fol. 186] this first-class coach.

Mr. Taylor: Just a moment. That is objected to as immaterial, incompetent and irrelevant.

Mr. Westbrooks: Well, it is all competent, material and relevant, if the Examiner please, in showing the utter disregard of the rights of passengers.

It is the duty under the law of common carriers to protect equal facilities and comforts for their passengers—or rather to provide equal facilities and comforts for their passengers.

This was an interstate passenger, in a very poor condition of health at that time, which was known to the conductor, who ejected him out of this comfortable first-class car and put him in this Jim Crow car, coach, where coach fares were paid,—as has been testified to by the witness.

Exam. Disque: You are not going into it in any detail, are you?

Mr. Westbrooks: No, no.

Exam. Disque: He may answer that question.

A. Well, I was sick. I had been advised by my physician that I was suffering from low blood pressure; and we had been in a terrible fight in Washington, over the passage of the anti-lynching bill, and I had asked to go away, to build up my health, and I was going to Hot Springs for that purpose.

I was sick at the time, when I left Washington, and the [fol. 187] records there will show that I was excused from Washington because of illness.

By Mr. Westbrooks:

Q. Now, did you inform the conductor at the time he told you to leave the car—

A. Yes, sir.

Q. —of your illness?

A. Yes, sir.

Q. Now, after you arrived in Hot Springs in the Jim Crow car, second-class, after you had paid your first-class fare,

did you have occasion to go to the station at any other time and see this particular train, that is, this train No. 45?

A. I did.

Q. (Continuing) Arrive there?

A. I was in Hot Springs for about 16 or 17 days, and I went down and looked at that train a half a dozen times or more during the time that I was in Hot Springs.

I would see it come in—it was sort of a custom to go down, of the patients at the Hotel, and the bath house where I was stopping,—and to spend part of the time by going down to meet this train, and see who else came in, and that sort of thing; and I did it along with the rest.

Q. Now, then, will you describe—you saw the Pullman cars, first-class cars as they came in on that train, did you?

A. Yes, sir.

Q. And did you see any colored people riding as passen-
[fol. 188] gers in those first-class cars, Pullman cars?

A. I did not. I did not see any colored people riding as passengers on the Rock Island. They refused me a ticket over the Rock Island, to go back. That is why this ticket was not used. I came back over the Missouri Pacific.

I tried to get Pullman accommodations in Hot Springs, to come back here, so that I would not—I had this ticket photostated, and wanted to use the ticket, but they would not sell me accommodations out of Hot Springs to Chicago, Pullman accommodations, when I got ready to return.

Q. Was that at the Rock Island station?

A. Well——

Q. Or what station?

A. I don't know whether it is the Rock Island station or not, but it is where the tickets—it is where the Rock Island trains come in and go out.

Q. Well——

A. I don't know——

Q. Where they sell and buy Rock Island tickets?

A. Yes, sir.

Q. And also they have Pullman tickets for sale at that same place?

A. Well——

Q. Over the Rock Island?

A. I presume they do. They didn't sell me one; they said
[fol. 189] they wouldn't do it.

Q. Well, now, what was the condition of the car that you saw the colored passengers riding in?

A. Why, it was about the same as the one that I described, the car which I spoke of, which was a small section of—what I would call an antiquated railroad car, used for a diversity of purposes.

Q. Now, about the upholstering? Did you describe the upholstering?

A. I would describe the upholstering as being poor and worn; and no towels.

In the first-class car they have white towels that are on the back of the seats; they have them in all of the Pullmans that I have ever used, and they have them in some of the coaches; but they don't have anything like that in the Jim Crow cars.

In fact, there is no effort made by the railroad to give the negroes equal accomodations.

Q. And you saw that same Jim Crow car,—that is, the same kind of a Jim Crow car, coming in on that train.

A. Yes, sir.

Q. During each day?

A. I have been seeing it for 25 years, and there has been no change worth speaking of in it.

And not only have I been there and seen it, but I have [fol. 190] been riding in it for that length of time; I rode in it two weeks ago.

Mr. Westbrooks: Now, there is a difference in the coach fare and the first-class fare. I am sure the Commission takes judicial notice of the difference in the coach fare and the first-class fare.

That is what you take judicial notice of, because you fix the rates, and it needs no proof.

By Mr. Westbrooks:

Q. Now, there is a suit pending in the Circuit Court of Cook County, Illinois, against these defendants, Mr. Witness, is there not?

A. Yes, sir.

Q. That is, you filed a suit?

A. Yes, sir, I filed suit against these defendants in the Circuit Court of Cook County, before this petition was filed.

Q. Yes, and answers—that was before the petition.

A. Yes.

Q. And answers have been filed?

A. They have.

Q. By each of the parties?
A. Yes, sir.
Q. Now, then, calling your attention to the answer, the separate answer of Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the estate of The Chicago, Rock Island & Pacific Railway Company, a corporation, in the suit of Arthur W. Mitchell, plaintiff, versus Frank O. [fol. 191] Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the estate of The Chicago Rock Island & Pacific Railway Company, a corporation; Illinois Central Railroad Company, a corporation; and The Pullman Company, a corporation, defendants, No. 37-C-5529, at law—just a moment.

Please mark this for identification Complainant's Exhibit No. 5.

I will ask you to look at that answer. Did you examine the original answer on file in the Circuit Court of Cook County, sir?

A. You are referring to the answer made by——
Q. Frank O. Lowden?
A. The Rock Island?
Q. Yes.
A. I did.
Q. Did you compare it with this carbon copy?
A. Yes, sir.
Q. That was filed also——
A. Yes, sir.
Q. By the Rock Island?
A. I did.
Q. And are they identical, sir?
A. They are identical. This is a correct copy of the original which is filed now in the Circuit Court of Cook County.

[fol. 192] Mr. Westbrooks: Now, sir, I offer in evidence this document.

Mr. Taylor: It is objected to on the ground that it is immaterial, irrelevant, incompetent, and not within the issues made by this petition.

Mr. Westbrooks: Is there any objection to my answering counsel? It is against the Lowden interests. Now, it is relevant and material because the same issues are involved, and under oath, this would be a duplicate original.

It is signed and sworn to by Charles E. Mekota, who says that he is general claim agent of this defendant, which is here now; and he makes oath that he is authorized by the trustees to make this affidavit; that he has read the answer, and knows the contents thereof; he has made an investigation of the facts, and the same are true, except those on information and belief.

Therefore, this answer is pertinent to the issues involved in this case.

Exam. Disque: Let me see it.

Mr. Westbrooks: I offer it in evidence.

Exam. Disque: We will take a few minutes recess.

(A short recess was taken.)

Exam. Disque: Come to order, please.

Mr. Westbrooks: If the Examiner please, it is agreed and stipulated by and between the Rock Island Railway—or [fol. 193] the group of defendants known as Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, which we will call the Rock Island, for convenience, and the complainant, that paragraphs 16, 17 and 18 of the answer, the verified answer filed by this defendant in the Circuit Court of Cook County, Illinois, may be read into the proceeding.

Is that correct?

Mr. Taylor: Yes.

Exam. Disque: That means that you are not offering, then, the exhibit which you did offer before recess?

Mr. Westbrooks: This is a part of that exhibit.

Exam. Disque: You are withdrawing the exhibit?

Mr. Westbrooks: I am withdrawing the exhibit for the purpose of—that is, I am only offering this part of it. The exhibit has been identified. It is a part of the exhibit.

Paragraph 16, reads:

"These defendants further state that the Pullman car which the train conductor requested the plaintiff to vacate, and which the plaintiff did vacate in obedience to the request of said train conductor, except for the drawing rooms and compartments therein, was at the time assigned to and occupied by passengers of the white race, and that the drawing rooms and other compartments of said Pullman car to which the plaintiff might have been assigned, were wholly occupied by other passengers; and the train conductor was [fol. 194] required by the laws of the state of Arkansas,

and under penalty thereof, to assign the plaintiff, who, these defendants allege on information and belief is a person 'in whom there is a visible and distinct admixture of African blood' "——

That "'in whom'" was in quotation marks, down to "'blood'."

"—to the car or coach set apart for persons of his race."

That is paragraph 16. Now, paragraph 17:

"These defendants state that the acts and conduct of the train conductor in requesting and directing that the plaintiff vacate said Pullman car, and that he occupy the coach set apart for persons of his race, were in pursuance of the power conferred on him by, and in obedience to, the requirement and command of the Separate Coach Law of the State of Arkansas, hereinabove mentioned and set forth."

Paragraph 18:

"These defendants admit that the railway fare charged passengers who ride in Pullman cars is in excess of the fare charged passengers who ride in coaches; and that there is now due to plaintiff the difference in the railway fare paid by him for transportation from Memphis to Hot Springs, and the fare properly chargeable to him for that portion of his journey, when he was a passenger in the day coach of these defendants; and that said difference is the sum of $3.74, which amount these defendants herewith tender and [fol. 195] offer to repay to plaintiff, with lawful interest thereon."

Now,——

The Witness: May I speak to him further, your Honor?

Exam. Disque: Yes.

(The witness conferred with counsel.)

By Exam. Disque:

Q. Have you stated, Mr. Mitchell, what accommodations you wanted in this Rock Island train?

A. Well——

Q. Was it a seat in a drawing room, or a seat in a car, or what was it?

A. When this porter took me in there, the drawing room

was occupied to Memphis, and he told me, if the drawing room was not taken out of Memphis, he was going to give me the drawing room, but of course, I would have to pay that extra fare; and if it was, why, I could occupy the seats that he gave me.

I guess I rode 8 or 10 miles in the car before I got to Memphis, with my baggage, in a double seat,—or at least, that is, in a section.

I don't remember just what the number of the section was, but I stayed in that same section until I had gotten 8 or 10 or maybe 15 miles from Memphis, going toward Little Rock.

Mr. Westbrooks: Now——

A. (Continuing) It wasn't in the drawing room; it was one of those sections with the partitions extended, as these modern Pullman cars are built.

[fol. 196] Q. Now, the Pullman Company is a defendant in the suit, 37-C 5529 in the Circuit Court; is that correct?

A. They are.

Q. You had occasion to examine the original answer, separate answer, filed by the Pullman Company in that suit, did you?

A. Yes, sir.

Q. And this is an exact copy of the same, is it?

A. Yes, sir.

Q. As examined by you?

A. Yes, sir.

Mr. Westbrooks: I ask that it be marked exhibit 6.

Exam. Disque: You withdrew 5?

Mr. Westbrooks: No, we withdrew only a portion of exhibit 5. We left in the portion which I read into the record.

Mr. Roemer: There is no exhibit 5. You have read something into the record.

Exam. Disque: No. 5 is out.

Mr. Roemer: No. 5 is withdrawn.

Exam. Disque: We have not got it.

Mr. Westbrooks: Well——

Exam. Disque: You withdrew exhibit 5, and never introduced it.

Mr. Westbrooks: It makes no difference whether we consider that as part of exhibit 5, or as a matter of stipulation.

Mr. Taylor: Let me try to clear it up, if I may.

[fol. 197] Mr. Westbrooks: Yes.

Mr. Taylor: We stipulated that the entire answer of the Rock Island Railway Company and its trustees, would be withdrawn as an exhibit, but that you might read into the record as evidence in this case, paragraphs 16, 17 and 18 from the answer of the trustees of The Rock Island Railway Company.

Is that not right?

Exam. Disque: That is the way I understand it. That means that exhibit No. 5 is withdrawn, and the new exhibit which you are now offering, is No. 5.

Mr. Westbrooks: Well, it is in, sir; it answers the same purpose, so we will withdraw No. 5.

Maybe we can save some time with The Pullman Company. There is only one paragraph, I believe, of that exhibit, paragraph 16, of The Pullman Company's answer.

If they will stipulate—it is verified by Erwin W. Roemer; I believe Mr. Roemer is here, and I am quite sure——

Mr. Roemer: Just paragraph 16?

Mr. Westbrooks: How?

Mr. Roemer: Just paragraph 16?

Mr. Westbrooks: Yes, just part of 16 here. This is the part that admits——

Mr. Roemer: Is that what you want us to admit?

Mr. Westbrooks: I want to read this portion—yes.

Mr. Roemer: If he wants us to admit that there were [fol. 198] vacant and unoccupied seats, we will do that.

Mr. Westbrooks: Yes.

Exam. Disque: All right.

Mr. Westbrooks: It is admitted, then, by the defendant, The Pullman Company, by its counsel, that there were vacant and unoccupied seats in the Pullman car in question.

Mr. Roemer: Right.

Mr. Westbrooks: On the occasion in question.

Mr. Roemer: Right.

Mr. Westbrooks: That is what they are admitting there. Now, if the Examiner please, the Illinois Central: maybe we can get an admission from them as to paragraph 18,—from the Illinois Central.

Mr. Mitten: Just a moment.

Mr. Westbrooks: That is a verified complaint.

The Witness: A verified answer.

Mr. Westbrooks: Or a verified answer, I mean, by one, Kopp.

Referring to paragraph——

Mr. Mitten: What is the number of the paragraph?

Mr. Roemer: 18, he said.

Mr. Westbrooks: Paragraph 18 of the answer of the Illinois Central, sir.

Mr. Mitten: Do you want to read that in?

Mr. Westbrooks: Let me see——

[fol. 199] Mr. Mitten: If you want to read that whole paragraph in——

Mr. Westbrooks: No.

Mr. Mitten: —we will be glad to allow it to go in.

Mr. Westbrooks: No. Just a moment. I am going to see. The Illinois Central—this is the Illinois Central, is it not?

Mr. Mitten: Yes.

Mr. Westbrooks: You were not over there, so you cannot—just a moment. I will withdraw that, for the moment.

Mr. Deany: We were not over where?

Mr. Westbrooks: How?

Mr. Deany: We were not over where?

Mr. Westbrooks: In Arkansas, at the time in question.

Mr. Deany: Right.

(The witness left the stand and consulted with counsel.)

Mr. Westbrooks: Now, I think that is all at the present time, if the Examiner please.

Exam. Disque: Do you mean that you are through on direct?

Mr. Westbrooks: We are through with the direct testimony.

Exam. Disque: Cross-examine.

Mr. Taylor: No cross-examination.

Mr. Roemer: None.

The Witness: No questions?

[fol. 200] Exam. Disque: You are excused.

The Witness: Thank you.

(Witness excused.)

Exam. Disque: Who is next?

Mr. Westbrooks: Call Mr.——

Mr. Mitchell: Price.

Mr. Westbrooks: Mr. Price.

Exam. Disque: Be sworn.

THOMAS J. PRICE, was sworn and testified as follows:

Direct examination.

By Mr. Westbrooks:

Q. State your name.
A. Thomas J. Price.
Q. What is your address, sir?
A. 3812 South Parkway, Chicago, Illinois.
Q. How long have you lived in Chicago, Mr. Price?
A. I have lived in Chicago about 10 years.
Q. What is your business or profession, sir?
A. I am a lawyer.
Q. How long have you been an attorney, sir?
A. Pardon me?
Q. How long have you been a lawyer, engaged in the practice of law?
A. I have been a lawyer for 30 years. 20 years of that time, I spent in Little Rock, Arkansas.
[fol. 201] Q. You have had occasion to use the Rock Island System of transportation, have you?
A. Yes, sir. I used to use scrip on the Rock Island. I had a newspaper that I was interested in, called the Arkansas Times, and they used to pay that in exchange for advertising.
Q. Now, then, are you familiar with the train that runs from Memphis, Tennessee, through Hot Springs—through Little Rock, Arkansas, to Hot Springs, and on out west, sir?
A. Yes, sir.
Q. No. 45 I believe they call it.
A. Yes, sir.
Q. And are you familiar with the class of facilities that are furnished to colored people, to ride in?
A. Yes, sir.
Q. Are you familiar with the class of facilities on that train that are furnished to first-class passengers, to ride in?
A. I am.
Q. Now, will you describe that coach. I believe they call it——
A. Well, now——
Q. What they generally call a Jim Crow car.
A. The Rock Island, as I remember it——

Mr. Taylor: Just a moment. Unless he is making a description, or intends to make a description of the train upon which this petitioner rode I object.

[fol. 202] I want to insist that all of the testimony in this case, according to the allegations of the petition, be directed to this one particular transaction and this one particular train.

Exam. Disque: No, this is a continuing proposition. It does not deal with this one coach, now, as I understand it.

Mr. Westbrooks: No, that is correct. That is a continuing proposition, before as well as after.

Exam. Disque: He is alleging discrimination, and he wants to have it removed for the future.

Mr. Taylor: He has not alleged——

Exam. Disque: That is the purpose of his case.

Mr. Westbrooks: Absolutely.

Mr. Taylor: It may be the purpose, but he has not stated it in his complaint.

Exam. Disque: You know what it is, do you not?

Mr. Taylor: Yes.

Exam. Disque: There is no mistake on your part about the issues in this case, is there?

Mr. Taylor: Well, I hope not.

Mr. Hughes: If the Examiner please, we can only determine the issues which he raises by his complaint, and his complaint confines itself to an experience which he had, or alleges:

Mr. Westbrooks: Except—pardon me.

Mr. Mitchell: I would like to call the attention of the [fol. 203] Commission to the fact that I testified on my direct testimony, that not only was that the condition when I rode on that train, but I saw that train day after day, and that condition was still the condition, and nothing was said about it.

That is already in the record.

Mr. Taylor: Well, then, this other is merely cumulative.

Mr. Westbrooks: We want it that way; we want corroboration.

Mr. Taylor: We object.

Mr. Westbrooks: That is the purpose of the proceeding.

Mr. Taylor: We object to any testimony of that character——

Mr. Westbrooks: Well, pardon me——

Mr. Taylor: (Continuing) —as going beyond the scope of the petition.

Exam. Disque: This man asks that the discrimination be removed, in the future. Now, what is the discrimination that he asks be removed? Do you admit that there is a discrimination today,—not talking about whether it is undue, or not?

Mr. Taylor: No.

Exam. Disque: He says that there is a discrimination today, and he wants it removed.

Mr. Mitten: He alleges one particular act of discrimination, and that is the one that we are meeting here, if the Examiner please.

Exam. Disque: We are legislating for the future here, [fol. 204] so to speak. What shall these railroads do in the future? Shall they continue this discrimination, or shall they not?

Mr. Westbrooks: That is the point.

Exam. Disque: We do not care about this particular incident. We are talking about the future. What are you going to do in the future?

Mr. Westbrooks: This is for the purpose, sir, of removing a condition, which we claim violates the Interstate Commerce Act, and I believe that, under the law, within a reasonable period of time, we can show that this condition has existed.

The one act certainly gives him his interest to bring this suit.

Exam. Disque: Now, if the railroads will admit that this discrimination will be removed in the future the case will end, possibly.

Mr. Westbrooks: That is all we want, that discrimination removed.

Exam. Disque: This particular act is merely a sample of what you expect for the future?

Mr. Westbrooks: Yes, that is the idea.

Exam. Disque: The purpose of this case is to have the Commission make an order for the future, if there is any undue discrimination.

Mr. Mitten: But that order must be based upon the one [fol. 205] act which is charged in the complaint; is that not true?

Mr. Westbrooks: No.

Exam. Disque: No.

Mr. Westbrooks: That is not correct.

Exam. Disque: No.

Mr. Mitchell: No.

Exam. Disque: I do not take that view.

Mr. Westbrooks: It is based upon a course of conduct.

Exam. Disque: It is an example.

Mr. Westbrooks: Against which we complain.

Mr. Mitchell: Based on the practices of these defendants.

Exam. Disque: We all know what the practice is, so what is the objection to letting the matter go in?

Mr. Taylor: It is not alleged in the complaint, or in the petition; and that is the thing that we are here to meet.

Exam. Disque: Well, the objection is overruled. We will proceed.

Mr. Westbrooks: All right.

By Mr. Westbrooks:

Q. Proceed to describe the condition of that car you said was called a Jim Crow car, Sir, for colored passengers.

A. Well, now, you must pardon me if I refresh my memory a little bit here.

The Rock Island, as I remember it, had three types of [fol. 206] cars or service, for negro passengers. They had a car that they divided up in three sections, with black leather upholstery. They had another combination in which they put you up there next to the baggage coach, and that was divided up into two sections, a smoker and another section there.

Then, they had a car that was divided up into two sections there, with ordinary upholstery,—not a chair car at all.

Mr. Taylor: Pardon the interruption for a moment, but we would like for the witness at this time, if possible, to specify the period about which he is talking.

Mr. Westbrooks: Yes.

By Mr. Westbrooks:

Q: Would you give the period of time in which you observed these conditions, Mr. Price?

A. Well, the last time I rode on the Rock Island Railway was about eleven months ago.

In the period from 1908 to about 11 months ago, I rode

up and down, all over the state, wherever the Rock Island tracks carry the engines and the trains.

Q. Now, then, describe those conditions as you saw them.

A. Well——

Q. The conditions you were describing, were the conditions which have been existing in the period from 1908 down to the present time?

A. Yes. They were not anywhere up to the accommoda-
[fol. 207] tions they had for white people, because I rode in those cars, and I noticed.

Down there in Arkansas one time, I was back there, and I got on the car, and when I saw the place was dirty, with peanuts and tobacco juice all over it, I just walked right on through into the other coach and sat down, and nobody said anything to me, and I said nothing to them.

I didn't have any badge on, as to whether I was colored or white.

Q. Did they have in the Jim Crow car a sign "For Negroes" or "For Colored"?

A. Yes, sir.

Q. And in the white car, did they have "For White"?

A. Yes, sir.

Q. And you did not see any other colored persons occupying those cars——

A. Oh, no.

Q. —where it said "For White"?

A. No, sir.

Q. What about the toilet facilities?

A. Well——

Q. (Continuing): In the Jim Crow car, where ladies would go?

A. Well, ladies—the men and women occupied—or used the same toilet, generally.

Q. Did you find any running water in that toilet?

[fol. 208] A. Oh, no.

Q. Any towels?

A. No.

Q. Any washbowl?

A. No.

Q. Now, that is in the "Colored" car——

A. You usually find it covered over with railroad dust, dust from the engine.

Q. That is, the toilet in there?

A. Yes, sir.

Q. Now, in the white compartment that you have had occasion to ride in: will you describe that?

A. Well, you find in there towels over the back of the chairs.

Q. Covers?

A. Yes, and clean.

Q. Yes.

A. Everything nice; air circulating.

Q. Washbowls?

A. Oh, yes.

Q. And towels?

A. Yes.

Q. Soap?

A. Yes, sir.

Q. And do they have separate toilets for the men and women?

A. Yes, sir.

[fol. 209] Q. That is in the white cars, in the compartments of white passenger cars?

A. Yes, sir.

Q. Now, then, you paid the first-class fare when you rode down there, did you not?

A. Oh, yes.

Q. And you said that up to eleven months ago, you found that same condition existing?

A. Yes, sir.

Mr. Westbrooks: All right.

Exam. Disque: Are you through?

Mr. Westbrooks: Cross-examine.

Mr. Taylor: We move to strike out the testimony of this witness, because it is neither relevant, germane or competent; or confined to the case made in the petition.

Exam. Disque: Is there any cross-examination?

(No response.)

Exam. Disque: The witness is excused.

Mr. Westbrooks: All right, Mr. Price; you may step down.

(Witness excused.)

Mr. Westbrooks: Call Mr. Edward H. Carry.

Exam. Disque: Be sworn, please.

EDWARD H. CARRY was sworn and testified as follows:

[fol. 210] Direct examination.

By Mr. Westbrooks:

Q. What is your name?
A. Edward H. Carry.
Q. Where do you reside, sir?
A. 4252 Vincennes Avenue.
Q. Chicago, Illinois?
A. Yes, sir.
Q. And how long have you been a resident of Illinois?
A. Seventeen years.
Q. Before that time, where did you reside?
A. Little Rock, Arkansas.
Q. How long were you in Arkansas?
A. Twelve years.
Q. Now, during the time that you resided in Arkansas, and the time you resided in Chicago, Illinois, have you had occasion to use the facilities of the Rock Island Railway Company, for transportation?
A. I have.
Q. About when was the first time you began using the Rock Island Railway for interstate transportation?
A. In Arkansas, you mean?
Q. From Arkansas to some other state, on the Rock Island?
A. Oh, I traveled through the south, from 1910 to 1920.
Q. And during that time did you—you said you traveled through the south. Did you travel on the Rock Island?
[fol. 211] A. Yes, sir.
Q. Into Arkansas?
A. Yes, sir.
Q. Did you go into any other state?
A. Oklahoma.
Q. Sir?
A. Oklahoma, from Arkansas,—from Little Rock.
Q. Did you have occasion to make a trip to Chicago, Illinois, also?
A. I did.
Q. Now, then, since you have lived in Chicago, Illinois, have you had occasion to return to your home state, Arkansas?
A. I have.

Q. How often have you returned, since you have been in Chicago?

A. Oh——

Q. By way of the Rock Island Railway?

A. That is the only way I have ever gone, Mr. Westbrooks. Several times.

Q. How many times?

A. Several times.

Q. Now, then, did you use—did you have occasion to use train 45, that runs from Memphis, Tennessee, through Little Rock to Hot Springs, and on out to Oklahoma?

A. Yes, sir.

Q. How many times?

[fol. 212] A. Several times.

Q. Did you have occasion to see the accommodations on that train that are furnished to white passengers?

A. I have.

Q. Have you ridden in those accommodations?

A. I have.

Q. And have you ridden in the accommodations that are furnished to colored passengers?

A. I have.

Q. What kind of a ticket did you have each time you were riding in both of those accommodations, sir?

A. I paid the same price.

Q. A first-class ticket?

A. First-class.

Q. Now, then, sir, will you describe those accommodations on that No. 45 train, that train from Memphis, Tennessee, over into—through Hot Springs, and Little Rock, and on out to Oklahoma?

A. Why, the coach that they set aside for negroes was usually a coach next to the baggage car, and it was usually divided into two sections, with poor accommodations as to cleanliness; one toilet; no washbowls.

Q. By "one toilet," do you mean for both men and women?

A. Yes, sir.

Q. Colored ladies and colored gentlemen?

[fol. 213] A. Yes, sir.

Q. Yes.

A. In the part of the section where the ladies were sitting, the conductor would usually use four seats for his

office; and in the part that was used as a smoker for the men—the women didn't smoke in those days very much—the butcher would usually use part of that for his storehouse, for his goods.

Q. Did they have colored men and white also smoking next to where the ladies' apartment was?

A. Yes, sir.

Q. What kind of a partition or door was there between them?

A. A little swinging door.

Q. A swinging door.

A. Yes, sir.

Q. And would there be an occasion—would there be any occasion, when passing through that door would cause smoke to come in where the ladies were, in their compartment?

A. Yes, sir.

Q. Did that happen quite often?

A. Yes, sir.

Q. Now, then, what about—there was no washbowl, you said?

A. No washbowl.

Q. No towels?

A. No towels.

Q. Any soap?

[fol. 214] A. No soap.

Q. Running water?

A. No running water.

Q. Hot and cold water?

A. None.

Q. Was there any water which could be used to flush the toilet?

A. No flushing.

Q. (Continuing) For the ladies?

A. No water.

Q. Now, did you ever see any prisoners carried on Rock Island trains?

A. Yes, sir.

Q. What compartment would the prisoners be in—or did you see prisoners occupy?

A. They would usually occupy the smoking compartment, next to the baggage room, where the smoking was, where negro men were.

Q. And that would be next to the compartment where the ladies were?

A. Yes, sir.

Q. Which colored ladies were compelled to occupy?

A. Yes, sir.

Q. Now, were those white or colored prisoners?

A. White and colored.

Q. Both.

A. Yes, sir.

[fol. 215] Q. Did you ever see, during the time you stated, from 1908 to the last time you were there—or father, 1910, I believe—did you ever notice any white or colored prisoners being carried in the coach set apart for white passengers?

A. No, sir.

Q. Ladies and gentlemen.

A. No, sir.

Q. Now, then, what about footrests in the compartment of the Jim Crow car, as they call it?

A. There usually weren't any.

Q. And what about carpets on the floor, and so forth?

A. There weren't any.

Q. Now, then, describe the cuspidors; what was the condition of the cuspidors in the compartment occupied by the ladies?

A. Usually very filthy.

Q. Now, will you describe the compartment that you saw, that was set aside for white passengers, that you had occasion to ride in?

A. Well, on a few times when I would go into the colored coach, or the coach set aside for negroes, the train conductor would run me out of there; he would remark, "This coach is for negroes," and so I would take his advice, and go on back into the white coach.

The conditions were so much different that I was rather glad that he ran me out.

Q. Now, then, describe the upholstering in the part where [fol. 216] you sat, which was occupied by white passengers.

A. Oh, it usually was clean. They had covers on the back of the seats, which were very comfortable; and the upholstering was nice,—plush, sometimes red and sometimes green; and comfortable.

Q. What about running water?
A. Plenty of running water.
Q. Hot and cold?
A. Yes, sir.
Q. Towels?
A. Yes, sir.
Q. Soap?
A. Yes, sir,—everything to make you comfortable.
Q. Washbowls?
A. Yes, sir.
Q. Now, did they have a smoking room in the coach for white persons?
A. Usually a whole coach was set aside for smoking.
Q. By white passengers?
A. Yes, sir, for white passengers.
Q. Now, then——

Exam. Disque: When you are talking about a "white" coach, you do not mean a Pullman coach, do you?
The Witness: No.
Mr. Westbrooks: No.
[fol. 217] Exam. Disque: You are talking about a second class coach?
The Witness: Yes.

By Mr. Westbrooks:

Q. The coach for white passengers provided by the railroad company.
A. Yes, sir.
Q. Exclusive of the Pullman Company?
A. Yes.

Exam. Disque: Are you alleging discrimination between the two kinds of second-class coaches, or only between the Pullman coach and the railroad coach?

Mr. Westbrooks: I am alleging discrimination, if the Examiner please, in the difference in the first-class accommodations which are furnished on a first-class ticket to a colored man, because he is colored, and the first-class accommodations which are allowable to a person because he is white.

Exam. Disque: All right.

By Mr. Westbrooks:

Q. Now, then, with respect to Pullman accommodations, sir: you have ridden in Pullman cars down in Arkansas, have you?

A. Yes, sir.

Q. On trains passing through that state, or in the state?

A. Yes, sir.

Q. Will you describe the Pullman equipment?

A. Well, the modern Pullman coaches are usually supplied with everything that would make passengers comfortable.

[fol. 218] Q. What about the upholstering?

A. The upholstering was first-class.

Q. Berths?

A. Oh, yes, berths first-class.

Q. Soap?

A. Yes.

Q. Towels?

A. Yes.

Q. Washbowls?

A. Yes, sir.

Q. Tables?

A. Yes, sir.

Q. Did you see the observation car?

A. Yes, sir.

Q. And the lounging compartments?

A. Yes, sir.

Q. Now, then, you have applied for Pullman accommodations, have you not?

A. Yes, sir.

Q. And were they sold to you, furnished to you, or were you denied them on account of your color?

A. Well, if I would make application for a Pullman in Arkansas, for instance, at Little Rock—they have separate ticket agents, or rather, ticket rooms, where you—or offices, where you buy your ticket; and if I would go into the room, [fol. 219] or the office set aside for negroes, they would not sell me one.

But if I would go around on the other side, they would sell me one without a question; and I usually went around on the other side.

Q. Now, then, when you did happen to go in where it said

"For Colored", did you have any conversation with the man about it?

A. Yes, sir. He would say, "I can't sell you one."

Q. Did you ask him why?

A. Well, yes, and he would say that it was against the laws to sell negroes a Pullman ticket, a ticket in a Pullman car.

Q. And there were Pullman trains—or cars——

A. Oh, yes——

Q. Running on the trains in which you rode?

A. Yes, sir.

Mr. Westbrooks: That is all.

Exam. Disque: Cross-examine.

Mr. Taylor: I would just make the same motion as to the testimony of this witness, that I did as to the testimony of the preceding witness; I move to have it excluded because of the reasons heretofore assigned.

Exam. Disque: All right. The record shows your motion, and the witness is excused.

The Witness: Thank you, sir.

(Witness excused.)

[fol. 220] Exam. Disque: Call your next.

Mr. Westbrooks: Mr. Harrison,—Judge Harrison.

Exam. Disque: Be sworn, please.

WILLIAM HARRISON, was sworn and testified as follows:

Direct examination.

By Mr. Westbrooks:

Q. What is your name, sir?

A. William Harrison.

Q. Where do you reside, sir?

A. I live in Chicago, Illinois.

Q. How long have you lived in Chicago, sir?

A. About 19 years.

Q. Previous to that time you resided where, sir?

A. In Oklahoma City, Oklahoma.

Q. Your profession or occupation is what, sir?

A. I am a practicing lawyer.

Q. And you have held office also, have you?

A. I have.

Q. What office have you held, sir?

A. In this state, I have held the office of assistant attorney general; and the office of member of the Board of Pardons and Paroles.

Q. And in Oklahoma City, Oklahoma, sir?

A. In Oklahoma City, Oklahoma, I was made special judge in the Superior Court of that county and state.

[fol. 221] Q. Now, sir, did you have occasion to travel on the Rock Island Railway System prior to April 20th, 1937?

A. I did.

Q. And have you had occasion to travel on the Rock Island Railway System subsequent to April 27th—April 20th, 1937?

A. No, sir, I have not. That is, I have traveled on it, too, but going to the Pacific Coast.

I have not been in the southern states on it, since that time.

Q. Now, then, calling your attention, sir, to—did you have occasion to travel over the Rock Island System through the state of Arkansas?

A. I did.

Q. There is a train, I believe, running from Memphis, Tennessee, through Hot Springs and Little Rock, to Oklahoma, called 45.

A. Yes, sir.

Q. Have you had occasion to travel on that train?

A. Yes, sir, I did have.

Q. Now, then, will you describe, sir—or, strike that out.

Did you notice the compartments which were occupied by the different passengers, that is, the colored and white passengers?

A. Yes, sir.

Q. What kind of ticket did you travel on, sir?

A. Well——

[fol. 222] Q. First or second-class?

A. I traveled on first-class tickets; that is, I paid the usual fare that all others paid for tickets.

Q. Now, then, calling your attention, sir, to the train—the part of the train that was set apart for the use of colored persons: will you describe that, sir?

A. Yes. One coach is cut up into compartments, the colored people occupying the compartment next to the

baggage car; and white passengers, smokers, occupying the rear part of that coach.

The toilet in the compartment for negroes was a common toilet at that time for men and women.

The upholstering in the car was leather. Part of that car was occupied by the conductor, and the news butcher. The butch ordinarily occupied two of the seats, and the conductor, two of the seats.

There was at that time no provision made——

By Mr. Taylor:

Q. At what time, please?

A. That was back in 1916, 1912, and on back to 1904.

Q. 1916, 1912, and 1904?

A. Back to 1904. The smoking—if men wanted to smoke, negro men, they had to smoke in that compartment. When I was there last, there was a little compartment midway of the car in which negro men could go and smoke.

It frequently happened that the conductor smoked in the [fol. 223] car, and so did the flagman—or the brakeman on the train.

There was no covering on the seats in that car. It was usually filthy; the cuspidors were always unseemly, and smelled.

In the other coaches it was easy to see the clean covers on the seats, and on the chairs that were furnished, in the same train.

It was in nowise equal, in point of comfort and convenience.

By Mr. Westbrooks:

Q. Did you notice—now, was this the train you are speaking of, that runs through Memphis?

A. This train runs through Memphis to Little Rock, and on through Oklahoma City, Oklahoma, and on to Amarillo, Texas.

Q. Arriving at Memphis just about 8:30 in the morning, and reaching Hot Springs about 1:00 o'clock in the afternoon?

A. Yes, sir.

Q. And then on through.

A. Yes, sir.

Q. Now, in this compartment which you say was cut off, this part of the car, did it have "For Colored Persons" or "For Negroes" or something like that?

A. Yes.

Q. A sign, that you recall?

A. Yes, there was a sign there.

Q. "For Negroes"?

A. Yes, sir.

[fol. 224] Q. And did they have separate toilets in that compartment for men and women, colored ladies and gentlemen, or only one toilet in that particular compartment?

A. They only had one, but my recollection is now, when I was there last, that they had separate toilets for them; but in that same compartment.

Q. Now, then, what about running water in the toilet, or washbowls?

A. There was no running water.

Q. Nothing to flush the toilet?

A. Nothing at that time.

Q. Now, in the first-class accommodations that were furnished the white passengers, ladies and gentlemen; you saw the Pullman cars on those trains, did you?

A. Yes, sir.

Q. Do you know whether they had running water?

A. They did have.

Q. And towels?

A. Towels.

Q. Soap?

A. Yes, sir.

Q. Washbowls—did they have any?

A. Washbowls.

Q. Clean washbowls?

A. Yes, sir.

[fol. 225] Q. And they kept the cuspidors in the Pullman car, fairly clean, did they?

A. Yes.

Q. In the Pullman cars.

A. Well, there were no cuspidors except in the smoker.

Q. In the smoker.

A. In the men's room.

Q. And that was kept clean?

A. Yes, sir.

Q. Now, on the Rock Island there, in Hot Springs, or any

part of Arkansas on the Rock Island System, have you applied for Pullman accommodations?

A. Yes.

Q. Along with a first-class ticket?

A. Yes, sir.

Q. What was the result of your application, sir?

A. I was denied transportation on a Pullman.

Q. Where did you apply, sir, on the Rock Island Lines?

A. I went to the regular station there in Hot Springs, Arkansas.

Q. In Hot Spring, Arkansas.

A. Yes, sir.

Q. And where did you make application for accommodations to?

A. From Hot Springs to Chicago.

Exam. Disque: When was all this?

[fol. 226] By Mr. Westbrooks:

Q. Now, about when was this?

Exam. Disque: When did all of this happen?

A. The last time I made application was about six years ago.

By Exam. Disque:

Q. Did they have second class in those days,—first-class and second-class?

A. I don't know. I made application for a Pullman out of Hot Springs, Arkansas, to Chicago, Illinois, at that time, offering to pay whatever the price might have been.

By Mr. Westbrooks:

Q. You bought a regular ticket?

A. Yes, sir.

Q. A regular through ticket, did you?

A. Yes, sir.

Q. And you made application for Pullman accommodations?

A. Yes, sir.

By Mr. Greenlaw:

Q. Did they tell you why you were denied?
A. Yes, sir.
Q. Why?
A. They said they could not sell them to colored people.

By Mr. Westbrooks:

Q. You know this coach business, first-class and coach,—the difference has only been in about three or four years. That is when you noticed it; is that correct?
A. Well, I didn't notice it then, at any rate.
Q. You did not notice it then?
A. No, sir.

[fol. 227] Mr. Westbrooks: All right. That is all.

Exam. Disque: Cross-examine.

Mr. Taylor: The same motion with reference to the testimony of this witness; we move that it all be excluded for the reasons heretofore assigned.

Exam. Disque: The motion will be given consideration, and the witness is excused.

(Witness excused.)

Exam. Disque: Call your next.

Mr. Westbrooks: Dr. John J. Pullen, please.

Exam. Disque: You still have several witnesses, have you, Mr. Westbrooks?

Mr. Westbrooks: Yes, your Honor.

Exam. Disque: Suppose we recess now until 2:00 o'clock. Is that all right?

Mr. Westbrook-: That is agreeable.

Exam. Disque: 2:00 o'clock.

(At 12:35 o'clock p. m., a recess was taken until 2:00 p. m.)

Afternoon Session. 2:00 p. m.

Exam. Disque: Come to order, please. Are you ready to proceed, Mr. Westbrooks?

Mr. Westbrooks: Yes, your Honor.

Exam. Disque: Call your next witness.

Mr. Westbrooks: Dr. John J. Pullen.

Exam. Disque: Be sworn, please.

[fol. 228] JOHN J. PULLEN was sworn and testified as follows:

Direct examination.

By Mr. Westbrooks:

Q. State your name, sir?
A. John J. Pullen.
Q. Your address?
A. 4314 Forrestville Avenue, Chicago.
Q. Your business or profession?
A. I am a retired physician.
Q. How long were you in the practice of medicine?
A. Thirty-nine years.
Q. Where did you practice; where were you practicing, Doctor?
A. Well, I practiced in the state of Arkansas for a number of years; I was in Alabama, Tennessee, and finished my work in Arkansas.
Q. Now, Doctor, you have lived in Chicago how long?
A. About 18 years.
Q. Have you had occasion at any time to travel from Chicago, Illinois, back to the state of Arkansas, since you have been here?
A. Yes, sir. I own property in Hot Springs and Little Rock, and I very frequently make trips down there.
Q. And have you had occasion to use The Rock Island Railway?
A. Yes, sir.
Q. In making trips from Chicago to Hot Springs?
[fol. 229] A. Most of the time.
Q. Have you had occasion to use the Rock Island System—that is, that part of the Rock Island System that connects at Memphis to Hot Springs, Little Rock, and on through Oklahoma?
A. Yes, sir.
Q. You paid your fare, did you?
A. Yes, sir.
Q. Now, Doctor, will you state the accommodations,—have you noticed the accommodations for colored and white persons on those trains?
A. Very distinctively, sir.

Q. Have you had occasion to ride in both the accommodations furnished for white, and the accommodations furnished for colored?

A. Well, occasionally I have rode in with the whites. On one occasion I was ordered out of the Jim Crow part back into the white; and I remained there to my destination.

Q. When you say "Jim Crow" is that the part of the car, or compartment——

A. Yes, sir.

Q. —set apart for colored people?

A. Absolutely, yes, sir.

Q. Now, when you were riding in this part that was set apart for white persons, will you state what was its condition?

A. Well, it was in first-class condition, everything was [fol. 230] strictly modern; water, running water in the toilets, in the baths, soap and conveniences, comb and brush in some of the compartments.

By Exam. Disque:

Q. Are you talking about a Pullman car now?

A. No, just about the passenger car, I am not talking about the Pullman. I am talking about the coach car, chair car.

Q. You mean, the white compartment.

A. Yes, sir, the white compartment.

By Mr. Westbrooks:

Q. Now, then, in relation to the part set apart for colored people: did you notice that condition?

A. Yes.

Q. Describe that compartment.

A. Well, I would always go into the colored compartment. I would always buy my tickets, which were first-class, but I would always go into the colored compartment, and I found some of them very bad, of course.

I don't know that I could give a decent recommendation to any of the colored compartments in that part of the country, and on that particular road.

Q. Well, what about the toilets?

A. I would go into the toilets frequently, and find no water, no way to flush the toilet, and it was very bad, the way it was.

Q. How about towels?

A. Well, I never seen any towels at all.

[fol. 231] Q. What about washbowls?

A. Sometimes I would see washbowls that would be covered with soot and cinders. Seemingly, they hadn't been used.

That is the condition I would find occasionally in there.

Q. Well, now, this particular car for colored people; how was this car arranged as to compartments?

A. Well, it was one coach, sometimes with two partitions, and sometimes one partition, and a part of that was used for smoking; and, of course, occasionally both white and colored would smoke in there.

On certain occasions, on several occasions, I have gone into the colored car, and would be sitting there with ladies and gentlemen of my race, and a man would be drunk in the white car, heaving all over everything, and he would be brought into the colored car and remain there until he reached his destination.

Q. Did you see any other persons occupying any part of that colored car where ladies and gentlemen, colored ladies and gentlemen were sitting?

A. Well, I would see the conductor and the flagman would have a couple of seats occupied. He would sit on one seat, and his grips and his tickets would be on the other, always in the colored coach.

Q. Now, Doctor, about when was the last time you made a trip from Chicago, down to Hot Springs, Arkansas, over [fol. 232] the Rock Island lines, from Memphis on to Hot Springs?

A. Well, I think it was in September, the last trip I made; this last September.

Q. September, 1937?

A. 1937.

Q. And did you find the conditions the same in September as you had previously found them?

A. I found the conditions on that particular trip, going down there, very bad.

I made a trip from Memphis to Little Rock, and then from there to Hot Springs, as I own property in Hot Springs and Little Rock; and, of course, I had occasion mostly to use the Rock Island Road.

Q. Did they have colored men and women both occupying the colored compartment——

A. Yes.

Q. —ladies and gentlemen?

A. Men and women, both, yes, sir.

Q. Did they have more than one toilet in that car?

A. No. The last trip I made, there was only one toilet, because I had occasion to use it, and had to wait until the ladies came out, who were in there.

Q. Well, now, what about in the coaches for white passengers? Did they have more than one toilet facility in there?

A. They had one at each end, in that coach, one for men [fol. 233] and one for women.

Q. How were they marked?

A. They said, "Ladies and Gentlemen."

Q. One for the ladies——

A. Yes.

Q. —and one for gentlemen?

A. "Men" and "Women" on the outside of the doors.

Mr. Westbrooks: That is all.

By Exam. Disque:

Q. I am confused by the fact that you say you paid first-class, and yet traveled second-class.

A. Well, I did.

Q. Why did you not buy a second-class ticket?

A. I don't remember of any second-class tickets being offered anybody down there. I would always buy a ticket, and it was a first-class ticket, but, of course, I would frequently go into the colored car, because it was the custom for me to do that.

Exam. Disque: It may not be important, but I was confused by your statement.

The Witness: Yes.

By Mr. Westbrooks:

Q. Well, prior to about 1933, they only had one class of tickets, as I understand it, one fare, and that fare, that ticket entitled you to use the Pullman, or anything else.

A. That is what I understand.

[fol. 234] Q. But later they changed, and they had two classes of tickets.

A. Yes.

Q. Now, they have one for the coach.

A. Yes.

Q. And one for what they call the regular ticket.

A. Yes, sir.

Q. And the regular ticket you must have, before you are allowed to use the accommodations?

A. I found that out lately, yes, sir.

Q. And all through here where we use the expression "first and second-class" we mean by that, the second-class was a coach ticket.

A. Yes, sir.

Q. Used in coaches and no other place on the train?

A. Yes, sir.

Q. And by first-class we mean that it would entitle you, for the price you pay, for the difference, to use the facilities anywhere on the train?

A. Yes, sir.

Mr. Westbrooks: That is all.

Cross-examination.

By Mr. Taylor:

Q. Well, now, what kind of a ticket did you have on your last trip? Did you have what is commonly known as a coach ticket?

A. No.

[fol. 235] Q. Or did you have a ticket that entitled you to ride in the Pullman car?

A. It was not a Pullman car ticket, but it was a first-class ticket.

Q. Yes?

A. First-class.

Q. Do you remember how much per mile you paid for it?

A. No, I don't remember. I paid the customary price, but I don't remember what it was.

Q. You told the agent from whom you bought the ticket, that you were going to ride in a coach, did you not?

A. No, I didn't. I didn't have to tell him that.

Q. You just simply asked for a ticket to Hot Springs?
A. Yes.
Q. Or Little Rock, as the case might be?
A. First-class ticket for Hot Springs.
Q. Yes.
A. I asked for a first-class ticket; that was all.
Q. You did not undertake to ride in the Pullman car?
A. No, sir.
Q. On that ticket?
A. No, sir, I didn't.
Q. You bought it——
A. How is that?
Q. You bought your ticket intending to ride in a coach, [fol. 236] did you not?
A. First-class fare.
Q. Answer the question.
A. Well, yes.
Q. You bought your ticket intending to ride in a coach, did you not, and not in a Pullman car?
A. (No answer.)
Q. Is that right?
A. Well, sure. I didn't buy a Pullman ticket. I would have had to buy a Pullman ticket, the way I understand it, sir.
Q. At the time you bought that ticket, you did not tell the agent that you wanted to ride in a Pullman car, did you?
A. No, certainly not.
Q. Have you ever ridden from Chicago to Hot Springs over that route——
A. Oh, yes.
Q. —in a Pullman car?
A. No, sir.
Q. Did you ever try it?
A. No, sir, I never tried it.

Mr. Taylor: That is all.
Exam. Disque: Are there any further questions?
Mr. Roemer: Nothing.
Exam. Disque: You are excused.
Mr. Mitchell: Just a moment, please.

[fol. 237] By Mr. Mitchell:

Q. This last ticket which you bought—you asked for a first-class ticket?

A. Yes, sir, I asked for a first-class ticket.

Q. You did not know at that time, did you, that—or did you know at that time that they sold coach tickets and first-class tickets?

A. I lived in the south for a number of years, and, of course, when I lived here, finding out that there was first-class, I asked for a first-class ticket, and rode in the chair car.

Q. As I understand it, this new coach ticket that we are talking about, is the new arrangement that is not more than three years old.

A. Yes.

Q. And you did not know about that before, when you bought your ticket, did you?

A. Sure not.

Mr. Mitchell: That is all.

Exam. Disque: Is that all?

(No response.)

Exam. Disque: That is all.

(Witness excused.)

Exam. Disque: Call your next.

Mr. Westbrooks: Mr. Morris.

Exam. Disque: Be sworn.

[fol. 238] Elias A. Morris, was sworn and testified as follows:

Direct examination.

By Mr. Westbrooks:

Q. What is your name?

A. Elias A. Morris.

Q. What is your address, sir?

A. 4171 South Parkway.

Q. Chicago?

A. Yes, sir.

Q. How long have you lived in Chicago, sir?

A. Sixteen years.

Q. Before that, where did you live?
A. Arkansas.
Q. What part of Arkansas, sir?
A. I was born in Helena, but I was living at Little Rock for about 12 years.
Q. What is your business, sir?
A. Federal employe.
Q. Since you have been living in the city of Chicago, have you had occasion, sir, to return to your home state of Arkansas?
A. I have.
Q. How often have you used the Rock Island System in returning to and from Chicago to Arkansas?
A. About three times, since I have been away.
Q. And have you had occasion to—or what class of ticket did you purchase, sir?
[fol. 239] A. I didn't know anything except a first-class ticket. That is what I have always purchased.
Q. When was your last trip made, sir?
A. 1926.

By Mr. Hughes:

Q. 1926?
A. Yes.

Mr. Westbrooks: 1926.
The Witness: Yes, sir.

By Mr. Westbrooks:

Q. Now, then, what compartment of the car did you ride in, sir?
A. Well——
Q. (Continuing:) Between Memphis and Hot Springs, or Little Rock, on the Rock Island System?
A. I have ridden both chair car and sleeper from Chicago to Memphis.
Q. Now, sir, describe the Pullman car in which you have ridden from Chicago to Memphis, through the Rock Island—or over the Rock Island route?
A. Well, it was a car that The Pullman Company has, very well furnished, plush backs for the seats, a smoking room with a lavatory off out of the smoking room; and with the proper necessities for keeping clean.

Q. How about running water?
A. Yes, sir.
Q. Did it have running water?
[fol. 240] A. Yes, sir, it had running water. I put that as one of the necessities.
Q. Hot and cold?
A. Yes, sir.
Q. Towels?
A. Yes, sir.
Q. Soap?
A. Yes, sir.
Q. And the car was well-carpeted?
A. Yes, sir.
Q. Properly carpeted?
A. Yes, sir.
Q. In the aisles?
A. Yes, sir.
Q. Porter service?
A. Yes, sir.
Q. Berths?
A. Yes, sir.
Q. Tables for use by the passengers?
A. If I needed a table to play cards on, and so forth, I could get it.
Q. And the car was clean,——
A. Yes, sir.
Q. —or otherwise?
A. Absolutely clean.
[fol. 241] Q. Sanitary?
A. Well lighted.
Q. Sanitary?
A. Yes, sir.

Q. Now, then, calling your attention to the section used by colored people, have you seen that car on that train that leaves Memphis about 8:30 in the morning?
A. Yes. I have ridden it many a time.
Q. Will you describe that particular accommodation?
A. Well, it was a coach that was divided into, at least to my knowledge, two sections, one for colored passengers, and the rear part of the coach was used as a smoking compartment.

The colored section was not so well kept. We had, as has been stated here, one lavatory.

Q. That is, for both men and women?

A. Men and women, with no soap, no towels, or anything of that kind.

Q. That is, for the non-smokers who rode in there?

A. Yes, sir.

Q. Women.

A. Yes, sir.

Q. No soap.

A. No.

Q. Towels?

A. No.

[fol. 242] Q. Washbowls?

A. Washbowls, perhaps. Sometimes it looked like they had been used, or had not been used. If they were used, they were still filthy.

Q. Was there hot and cold water in the washbowls?

A. There was no hot and cold water in the washbowls, no.

Q. Now, you said this car would be separated into two sections.

A. Yes, sir.

Q. One for smokers, and the other for the ladies—colored ladies and gentlemen?

A. Yes, there would be a partition,—sometimes perhaps 50 per cent of the car, or perhaps two-thirds of it.

Q. And what kind of a door would there be in between there?

A. Well——

Q. Whatever it was, was it opened frequently?

A. Oh, yes, for passage.

Q. Did you ever notice whether any smoke at any time came out of the smoker——

A. Oh, yes.

Q. —into this part where the ladies were sitting?

A. There would have to be.

Q. You did notice it?

A. Yes, sir, because I am an inveterate smoker myself, and I spent a lot of time in the smoker.

Q. Now, on these occasions when you said you rode in [fol. 243] the Pullman car—or when you rode in the Jim Crow car—that is what it is called down there.

A. Yes, sir.

Q. That was assigned to the colored—to negroes?

A. I think it said "For Colored."

Q. Now, whether you rode in the Jim Crow car, or whether you rode in the Pullman car, you said you paid the same rate of fare?

A. Yes, sir.

Q. And you always asked for a first-class ticket?

A. Yes, sir, absolutely.

Mr. Westbrooks: That is all.

Exam. Disque: Is there any cross-examination?

Cross-examination.

By Mr. Taylor:

Q. The last trip that you made was in 1926, was it?

A. 1926, yes, sir.

Mr. Taylor: That is all. I now move that the entire testimony of this witness be excluded from the record because it is irrelevant and incompetent, and too remote to have any bearing on the issue made in this case, or the transaction therein set forth.

Exam. Disque: There is some merit to your motion that it is rather remote. Is there any other cross-examination of the witness?

[fol. 244] Mr. Roemer: Nothing.

Exam. Disque: That is all.

(Witness excused.)

Mr. Westbrooks: Is Mr. Bush here?

(No response.)

Mr. Westbrooks: We will rest at this time, if the Examiner please. Complainant rests.

Exam. Disque: All right.

Mr. Westbrooks: Or—pardon me. Before we rest, I want to introduce the portion of the Arkansas law, the statute which was referred to by the defendant as the Separate Coach Law.

I want to introduce section 986, which is found in the Arkansas statutes. It is headed "Equality of Accommodation" and reads as follows:

"All railway companies carrying passengers in this state, shall provide equal, but separate and sufficient accommodations for the white and African races"

That is old section 986. In the last revised statutes, I believe of 1937, it is section 1190, to be found on page 570 of the last revised statutes, chapter 20:

"All railway companies carrying passengers in this state shall provide equal, but separate and sufficient accommodations for the white and African races, by providing two or more passenger coaches for each train.

[fol. 245] "Provided that railway companies carrying passengers in this state may carry one partitioned car, one end of which may be used by white passengers and the other end by passengers of the African race, said partition to be made of wood, and they shall also provide separate waiting rooms of equal and sufficient accommodations for the two races at all their passenger depots in this state.

I want to also introduce section——

Mr. Taylor: I suggest, if I may, at this time that we stipulate that the entire Separate Coach Act of the State of Arkansas, be admitted in evidence in this case.

Exam. Disque: All right. It ought to be in the record, technically and physically. The parts that are pertinent, you can refer to in your brief.

Mr. Taylor: It is not a very long statute.

Mr. Westbrooks: Well, I am just referring to these two portions specifically, and then I will stiptulate as to the others.

Now, as to separate sleeping cars:

"Separate sleeping and chair cars.

"Carriers may haul sleeping or chair cars for the exclusive use of either the white or African race separately, but not jointly."

Now, then, those are the portions which——

Mr. Roemer: Does not the Commission take judicial [fol. 246] notice of the Arkansas statute?

Exam. Disque: No, I understand not. As I understand it, the state law has to be proven.

Mr. Roemer: No longer in the state of Illinois. By statute, they provide now that the courts take judicial notice not only of the laws of Illinois, but of municipalities within the state, and also the laws of all the other sovereign states of the union.

Mr. Hughes: What is the stipulation, now; that it is available for all purposes?

Exam. Disque: Off the record.

(Discussion off the record.)

Exam. Disque: Are you offering this, Mr. Westbrooks?

Mr. Westbrooks: Only what was read.

Mr. Mitchell: Here is a copy, if you want; that can go in.

Mr. Roemer: Are you submitting it, or are you stipulating, or what?

Mr. Westbrooks: Only the two sections, 1190 and 1193, about sleeping cars, and so forth, which were read.

Otherwise it is a defendants' exhibit.

Exam. Disque: Whoever puts it in, it is exhibit No. 5.

Mr. Westbrooks: Pardon me?

Exam. Disque: We will call it exhibit No. 5, regardless of who puts it in.

[fol. 247] Mr. Taylor: Did you not stipulate with me that the entire Separate Coach Act of the state of Arkansas——

Mr. Westbrooks: No; I was reading a portion of it.

Mr. Taylor: (Continuing) —might be admitted in evidence? Did you not just stipulate that with me awhile ago?

Mr. Westbrooks: I do not think the record will show that. All I was doing was, I was reading the parts that I desire to have placed in the record.

If you want to offer it, I have no objection.

Exam. Disque: It is in the record now, anyhow.

Mr. Taylor: How.

Exam. Disque: It is in the record now.

Mr. Westbrooks: No objection.

Mr. Taylor: All right.

Exam. Disque: It is exhibit No. 5.

(Exhibit No. 5 received in evidence.)

Exam. Disque: Are you through now?

Mr. Westbrooks: Yes, I think so.

Exam. Disque: Defendants may proceed.

Mr. Roemer: If the Examiner please, so far as The Pullman Company is concerned, I would like to make a motion at this time for your consideration: that the Commission dismiss the action, or the complaint, or the proceeding, so far as The Pullman Company is concerned.

Mr. Mitten: The same motion is made on behalf of the [fol. 248] Illinois Central Railroad Company, on the ground

that the complainant has failed to prove that the Illinois Central Railroad is guilty of the violation of any sections of the act relied upon.

Mr. Taylor: And may the record show the same form or motion on behalf of the trustees of the Rock Island Railway.

Exam. Disque: All right. Call your next witness.

Mr. Taylor: Mr. Jones.

Mr. Deany: Will your Honor rule on the motion?

Exam. Disque: Not now. Be sworn, please.

ALBERT W. JONES, was sworn and testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?

A. Albert W. Jones.

Q. Where do you reside?

A. 711 East Sixth Street, Little Rock, Arkansas.

Q. What is your occupation?

A. Conductor.

Q. Railroad conductor?

A. Yes, sir.

Q. By whom are you now employed?

A. The Chicago, Rock Island & Pacific Railway Company—or the trustees, rather, of The Chicago, Rock Island & Pacific Railway.

[fol. 249] Q. The Chicago, Rock Island & Pacific Railway Company went into bankruptcy in 1933?

A. Yes, sir.

Q. And trustees were appointed; and you have been working for the trustees since that time?

A. Yes, sir.

Q. For the last several years, Mr. Jones, what has been the general nature of your employment?

A. Well for the last 32 years I have been running a passenger train.

Q. Well, for how long a time—is your run now, and has it been for the last 5 or 6 years, between Memphis and Little Rock on the Rock Island Railway?

A. Between Little Rock, Hot Springs and Memphis. I make all three points.

Q. Well, just give us your routine. You do not go from Memphis to Little Rock, or Memphis to Hot Springs every day, do you?

A. No, sir.

Q. Just what is your routine?

A. I start out of Little Rock at 11:25 a. m., and go to Hot Springs, and back to Memphis that night, getting into Hot Springs at 1:05; leaving there at 3:05, and getting to Memphis at 7:30.

I leave there the next morning at 8:30, and I go to Lit-
[fol. 250] tle Rock. I get there at 11:15.

The next day I go to Memphis, and back on a local train; and then I catch the other job back again,—four crews.

Q. How long have you been a conductor—the train of which you are usually conductor is train 45 and 46?

A. 45 and 50.

Q. 45 and 50.

A. Yes, sir, the fast train.

Q. 45 goes from Memphis to——

A. Hot Springs.

Q. —Hot Springs.

A. Yes, sir.

Q. And 50 goes where?

A. Hot Springs to Memphis.

Q. Hot Springs to Memphis.

A. Yes, sir.

Q. The train running south—or west, then, is No. 45?

A. Yes, sir.

Q. And the train running north,—or east, is No. 50?

A. Yes, sir.

Q. Does that train—do either one of those trains go any further north and east than Memphis?

A. No, sir.

Q. Does it go—does the train go any further south, or west, than Hot Springs?

[fol. 251] A. No, sir.

Q. Does that train, or any part of it, run into the state of Oklahoma?

A. No, sir.

Q. Now, how long did you say you had been conductor on train 45-50?

A. Well, I have been on that job right there, around 15 years.

Q. Running pretty regularly?

A. Yes, sir.

Q. What is the equipment of train 45?

A. It consists of a baggage car, a combination coach, a straight day coach, diner, sleeper, and parlor car.

Q. How are they located in the train?

A. The baggage car is next to the engine; then comes the combination coach; then the day coach, diner, sleeper and parlor car.

Q. The sleeper on that train is a Pullman sleeper, is it?

A. Yes, sir.

Q. Owned by The Pullman Company?

A. Yes, sir.

Q. Is all of the balance of the equipment owned by the Rock Island trustees—the trustees of the Rock Island Railway?

A. Yes, sir.

Q. I direct your attention to the morning of April 21st, 1937. Do you recall having seen this man here, Congress-[fol. 252] man Mitchell, on that morning? (Indicating.)

A. Yes, sir.

Q. I wish you would in your own way, taking all of the time you require, state to the Examiner, and for the record, under what circumstances you happened to meet him, and if you had any kind of a transaction with him, describe it.

A. Well, in my custom, in working the train, I commence at the head end, that is, the end of the Pullman car, and I work the Pullman car, the day coach, and then the diner.

On this particular occasion when I entered the sleeping car, it was from the head end of the car, where the compartments and the state rooms were, and in the vestibule, or the hallway, between the state rooms and the side of the car, I found the Congressman and the Pullman porter standing there in this vestibule, in the hallway.

I asked for his transportation in the usual way, and he handed me his ticket. At the same time he had a dollar in his hand, to hand to the porter. I asked him if he had a through sleeping car, and he said no. I said, "Well, we can't accept your dollar, unless the porter has a compartment or state room that he can put you in."

The porter said, "I don't think we can; we haven't any." I said, "Well, I am sorry, but you will have to go to the combination car—the colored car."

He spoke up and he said that they told him in Chicago that [fol. 253] him being a congressman, he wouldn't have any trouble getting through in the car. "Well", I said, "I am sorry. The law doesn't make any provision for a Congressman, any more than it does anybody else." And the porter spoke up and said, "He is Congressman Mitchell from Chicago."

I said, "Well, I am sorry, but I can't do anything for you. I can't accept this Pullman fare, and I will have to comply with the law, and have to have the law complied with."

He said, "I know what the law is, but it is unjust." "Well", I said, "I am sorry, but I can't change that law." And with that he walked on back and sat down, I think about section 3.

I worked on back, checking the berths, and when I got back to him, he asked me what I was going to do with his ticket. I said, "Well, I will make a notation on your ticket, and you can get your refund of one cent per mile." He said he didn't want a refund; that he wanted service. "Well" I said, "I am sorry I can't give you the service." I said, "I will have to suggest, or require the law to be lived up to"; and with that I left him.

I went on back and worked my parlor car, and when I came back he had done gone up in the other car, and that was the last that I spoke to him.

Q. When you saw him again, where was he?

A. Up in the colored car, at the front of the train.

[fol. 254] Q. Do you remember in what compartment of the colored car he sat?

A. Yes.

Q. State.

A. He sat in the middle compartment, next to the ladies' toilet.

Q. Now, as accurately as you can state it, where was your train at the time you first encountered Congressman Mitchell?

A. It was right near Hope, 9 miles from Memphis, in the state of Arkansas.

Q. Now, did you leave that train that morning yourself at Little Rock?

A. Yes, sir.

Q. And another conductor took the train from Little Rock to Hot Springs?

A. Yes, sir.

Q. What portion of the journey between Memphis and Little Rock did you spend in the colored car?

A. Most of the time from Forrest City. I had an auditor get on, and he took charge of the transportation at Forrest City, and I had nothing else to do; and the only time I got out of the colored end of that car was at Brinkley we made a stop there, and I had to get out.

Probably I rode in the colored end of that car from Forrest City to Memphis; that is, in the smoker end of it.

[fol. 255] Q. Do you mean, from Forrest City to Little Rock?

A. How?

Q. From Forrest City to Little Rock?

A. From Forrest City to Little Rock.

Q. Your train was going toward Little Rock?

A. Yes, sir.

Q. How far is it from Forrest City to Little Rock?

A. 87 miles.

Q. How far is it from Memphis to Little Rock?

A. 133 miles.

Q. During the time that you were in the car between Forrest City and Memphis, was Congressman Mitchell in the car all the time?

A. He was in the middle compartment,—not in the compartment I was in. He was in the middle compartment.

By Exam. Disque:

Q. What is that devoted to, the middle compartment?

A. For the women, colored women.

Q. Colored women?

A. Yes, sir.

By Mr. Taylor:

Q. Well, colored men may be there also, may they not?

A. Yes.

Q. If they want to?

A. Yes, but that part they call the colored women's part.

[fol. 256] Q. Just describe that car to the Examiner, in which Congressman Mitchell was riding?

A. It has three partitions. It is a solid steel car with three partitions.

The front end of it is used for a colored smoker,—the front partition. The middle partition is used for women—or men, if they want to. The rear end is used for a white smoker, if they want to.

It is a three-partition car.

Q. It is a standard size——

A. Yes, sir.

Q. —steel passenger coach?

A. Yes, sir.

Q. Divided into——

A. Three partitions.

Q. —three compartments; is that it?

A. Yes, sir.

Q. And the rear compartment is used by white people, who want to smoke?

A. Yes, sir.

Q. Or for white people——

A. Yes.

Q. —whether they are smoking or not?

A. Yes, sir.

Q. And the middle one is devoted to colored men and women?

[fol. 257] A. Yes, sir.

Q. And the forward section is devoted to colored people who want to smoke?

A. Yes, sir.

Q. Or they may ride there, whether they smoke or not?

A. Yes, sir.

Q. Were there any toilets in that car?

A. Three toilets.

Q. Where were they located?

A. One was in the front end of the first partition of the car. The other, for women, in the middle compartment, was about middleways of the car. The other one was in the rear end of the car, at the rear end of the white smoker.

Q. Were any of those toilets, water toilets?

A. Just the middle toilet is a water toilet.

Q. With soap and towels?

A. Paper towels, yes, sir.

Q. And a washbasin?

A. Yes, sir.

Q. The toilets at either end of the car were not flush toilets?

A. No, sir.

Q. The toilet in the rear end of the car was used by white people?

A. Yes, sir.

Q. And it was a dry toilet?

[fol. 258] A. Yes, sir.

Q. So to speak.

A. Yes, sir.

Q. That is, it was not a flush toilet.

A. Yes, sir.

Q. And the toilet in the forward end of the car, used by colored people, was the same kind of a toilet?

A. The same kind of a toilet.

Q. Except that the toilet in the center—was that used by white and colored?

A. No.

Q. By colored men and women?

A. Women.

Q. Well, I am talking about the compartment.

A. Yes.

Q. Was it used by men and women?

A. Oh, yes.

Q. But the toilet in the middle compartment was a water or flush toilet?

A. Yes, sir.

Q. With those accessories which you have named?

A. Yes, sir.

Q. But devoted to colored women?

A. Yes, sir.

Q. During the time that you spent in that car, did you [fol. 259] detect or notice any foul or obnoxious odors of any kind?

A. No, sir, I did not.

Q. Do you know whether or not that colored car is cleaned and renovated at Memphis, prior to its being put into those trains?

A. Yes, sir.

Q. Is it?

A. It is.

Q. What is the nature of the cleaning that is given it if you know?

A. Well, I couldn't exactly tell you the method that they use?

Q. No, but, what does it look like when you see it?

A. It is clean and nice.

Q. Are the spittoons clean?

A. Yes, sir. And they have some kind of disinfectant in them.

Q. Is there any dirt, peanuts, tobacco juice, or anything else on the floor?

A. No, sir. It is in first class condition.

Q. What kind of seats do they have in there?

A. Leather seats.

Q. Are there any—what do you call them——

Mr. Roemer: Covers.

By Mr. Taylor:

Q. Linen backs?

A. Seat covers.

Q. Or whatever it is, that are put on top of the seats?

[fol. 260] A. Yes, sir.

Q. Is that car equipped with those?

A. Yes, sir.

Q. Has it always been equipped with those linen back covers?

A. It has been equipped with them for the last five or six years, to my knowledge.

Q. Within the last 5 or 6 years, can you recall a single solitary time that that car had ever been operated, when you were the conductor on it, when it did not contain those linen backs?

A. No, sir.

Q. Are there any electric fans in the car?

A. Yes, sir.

Q. How many?

A. One in each compartment.

Q. What kind of ventilation has it?

A. They have ventilators that you can pull open or close, and they have a ventilating stick, to open and close them. There is plenty of ventilation.

Q. Now, on this morning of April the 21st, 1937, were either of the sections of that car that were devoted to colored people, crowded?

A. No, sir.

Q. You maintained your office, so to speak, in the forward part of that colored car, did you not?

[fol. 261] A. Yes, sir.

Q. What sort of an office did you have there?

A. Well, I just occupy two seats, for my working material, that I have there. I sit in one, and use the other seat for a kind of table.

Q. You had your grip there?

A. Yes, sir.

Q. And your tickets, and the envelopes that you put them in?

A. Yes, sir.

Q. And that is about all of the occupancy you made of that car, I suppose?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. You did not deprive Congressman Mitchell of a seat, did you?

A. No, sir.

Q. By being there?

A. No, sir.

Q. There was ample room in the car for him and others?

A. Yes, sir.

Mr. Westbrooks: If the Examiner please, I just want to tentatively make an objection, because counsel made the objection that I was testifying in my examination. Now, since he is testifying——

[fol. 262] Mr. Taylor: He can answer the question any way he wants.

Mr. Westbrooks: Since he is testifying——

Mr. Taylor: I did not suggest the answer.

Mr. Westbrooks: I just wanted to call attention to it, in consideration to the fact that counsel made an objection to my examining.

By Mr. Taylor:

Q. How many passengers, colored passengers would you say, according to your recollection, were in that car that morning?

A. Something like about five or six; not over that many.

Q. What is the capacity, the seating capacity of the two compartments that are devoted to the colored race?

A. I believe, as well as I can remember, it is about 42. I think one seats 20, and the other 22, as well as I can remember.

Q. Now, was there a news butcher up there with you that morning?

A. No, sir.

Q. Was there a news butcher on that train?

A. No, sir.

Q. Did you have any ice water in that car?

A. Yes, sir.

Q. How many coolers of it did you have in the car?

A. Three.

Q. Three?

[fol. 263] A. One in each compartment.

Q. Did they have water in them, to the best of your knowledge?

A. Yes, sir.

Q. Was there anything, Mr. Jones, that you can recall about the condition of that car, that was foul or odorous, during the journey of April 21st, 1937?

A. No, sir, not anything.

Q. What was the condition of that car?

A. First-class, as clean as it could be.

Q. When you say "first-class", what do you mean?

A. I mean, just as clean as it could be made.

Q. Now, based on your experience over the number of years to which you have testified as having been a conductor on train 45-50 between Memphis, Tennessee, and Hot Springs, Arkansas, what demand is there, or has there been for Pullman accommodation on the part of the colored population?

Mr. Westbrooks: My only objection to that is that this Commission has held that demand and supply have nothing to do with discrimination, in the Hurd case, and in other cases which have been decided by this Commission.

Exam. Disque: Volume of traffic may have some bearing on the case,—if that is what you have in mind.

Mr. Taylor: Yes.

Mr. Mitchell: We further object because this witness has not shown that he knows anything about the demands that [fol. 264] are made. He is not a ticket seller.

By Mr. Taylor:

Q. You are on the train, are you not? How many colored passengers have you observed on that train in the Pullman car?

A. Well, in my experience in the last 32 years, I will say I have handled about 10 or 12 cases of this kind.

Now, that was a year ago, it will soon be a year ago. I have not had a case since.

Mr. Westbrooks: Just a moment. That is objected to as not responsive,—handling a case of this kind. That is not responsive to the question.

By Exam. Disque:

Q. What do you mean by "of this kind"; where you had to eject a man?

A. Where I had to ask him to go up in the coach.

Exam. Disque: The question is, how many—is that the question?

By Mr. Taylor:

Q. What volume of traffic have you observed in Pullman cars on this train, of colored passengers?

A. Well, that is about, say, 10 or 12 in the last 32 years, I would say.

Exam. Disque: How could a colored man use a Pullman car on that train?

Mr. Taylor: Well, I will ask him that.

By Mr. Taylor:

Q. How can he use it?

[fol. 265] A. He can't.

Q. Do you have anything like—or, what is the fact; do you find colored passengers from time to time occupying compartments and drawing rooms on your train?

A. Yes, sir, compartments we do, once in awhile, but not in the body of the car.

Q. If just at the time of this transaction there had been a vacant compartment, or a vacant drawing room in that Pullman car, what would you have done?

A. Put him in there at the expense of The Pullman Company. That is why I asked him if he had a vacant compartment that he could put this man in, and he said no.

Mr. Westbrooks: Well, the objection to that is that what the man would have done had some contingency arisen, is not the question. The question is, what did he do in this instance.

Exam. Disque: I am not so much interested in this instance. I am trying to find out, what are the accommodations provided for white people, and what are the accommodations provided for colored people, in general, now, and for the future.

Now, if you have a Pullman car, and you put a colored man into a drawing room or compartment, is that in compliance with the state law?

A. Yes, sir.

Exam. Disque: I assume it is, because the law says some-
[fol. 266] thing about partitions.

Mr. Taylor: It is a substantial compliance. The segregation of the races is the gist of the statute. Compartments and drawing rooms used in that manner are a substantial compliance with the Arkansas law, because it accomplishes what the Arkansas statute undertakes to accomplish.

Exam. Disque: Now, Mr. Mitchell wanted either a compartment, or a drawing room, or failing in that, he would have taken a regular seat; but under the state law you could not give him an ordinary seat in the Pullman car?

Mr. Taylor: Where it amounted to a commingling of the races?

Exam. Disque: Yes.

Mr. Taylor: Right.

Exam. Disque: All right.

Mr. Taylor: Within the same enclosure?

Exam. Disque: Yes. Now, are you through with this volume of traffic testimony?

Mr. Taylor: No, not quite.

Exam. Disque: He is testifying only as to the passengers he sees in compartments or drawing rooms in Pullman cars. He is not testifying as to how many people offer themselves at ticket offices to buy tickets.

By Mr. Taylor:

Q. You do not know anything about that, do you, Mr. Jones?

[fol. 267] A. No, sir.

Q. Well, I will ask you only about matters within your own knowledge, then, Mr. Jones.

On an average, how many colored passengers per year have applied to you for passage in a Pullman car on your train?

A. Well, it won't average one a year.

Q. Now, Mr. Jones, you said you would have put the complainant, Congressman Mitchell, into one of the drawing rooms or compartments that morning, if it had been vacant, at the expense of The Pullman Company?

A. Yes, sir.

Q. Just what do you mean by that?

A. Well, I mean, so far as I was concerned.

Q. You mean you would have put him in there——

A. Yes.

Q. (Continuing) —and let The Pullman Company collect its own charge?

A. Yes, sir.

Q. Now, Mr. Jones, up to the time of this transaction had you ever been given any instructions by The Chicago, Rock Island & Pacific Railway Company, or its trustees, or any of its officers in authority over you, with reference to the disposition to be made of colored passengers in Pullman cars?

A. No, sir.

Q. Was your conduct that morning in pursuance of any [fol. 268] directions or instructions given to you by the railway company or its officers, or were you acting on your own motion and initiative, and in obedience to the statutes of the state, as you understood them?

A. On my own.

Mr. Westbrooks: Of course, my objection would be that that calls for a conclusion. That is for the Commission to determine, whether the conductor was acting for the company or not.

Exam. Disque: Well, he is just talking about whether or not he had instructions.

Mr. Taylor: Yes.

Mr. Westbrooks: Well——

Exam. Disque: And he says that he had no instructions, that he was doing what he thought was the right thing.

By Mr. Taylor:

Q. Why did you not let this man have a seat in the body of that Pullman car that morning?

A. Because it is against the law of the state of Arkansas.

Mr. Westbrooks: That is objected to.

By Mr. Taylor:

Q. What law?

Mr. Westbrooks: Objection.

A. The state law of Arkansas.

Exam. Disque: It was against what he thought was the state law.

Mr. Westbrooks: What he thought was the state law?

[fol. 269] Exam. Disque: Yes.

Mr. Westbrooks: All right.

By Mr. Taylor:

Q. You have read that state law, have you?

A. Yes, sir.

Q. Is it posted in the equipment?

A. It used to be. I don't think they do that any more, on the new equipment.

Q. The same statute, to your knowledge, is still in force, however?

A. Yes, sir.

Q. Does that statute—you know that statute, you say?

A. Yes, sir.

Q. Does that statute impose any duty or obligation upon you as an individual?

Mr. Westbrooks: Wait.

A. Yes, sir.

Mr. Westbrooks: Just a moment.

Mr. Taylor: What is it?

Mr. Westbrooks: In the first place, he is not qualified to state what the statute is. The statute is in evidence, and the Commission will determine the force and effect of the statute.

That is my only objection.

Exam. Disque: Are you asking him what his understanding is of the law; is that your question?

[fol. 270] Mr. Taylor: I have already asked him if he knew the statute, and he said he did.

Exam. Disque: All right.

Mr. Taylor: Then, I asked him, does that statute put any obligation on him?

Mr. Westbrooks: Well——

Mr. Taylor: And he said it did.

Mr. Westbrooks: And I objected.

Mr. Taylor: And I asked him, what?

Mr. Westbrooks: That calls for a conclusion, if the Examiner please.

Mr. Taylor: Well, it can be verified.

Mr. Westbrooks: It is not for him to determine; that is for the Commission.

Exam. Disque: The statute is here in the record.

Mr. Westbrooks: Yes.

Exam. Disque: And he is asking this man what his understanding of the statute is.

Mr. Westbrooks: Oh, well——

Mr. Taylor: Yes.

Exam. Disque: In the performance of his duty?

Mr. Taylor: Yes.

Exam. Disque: Now, what was your understanding of that statute in the performance of your duty?

The Witness: A fine on my part, if I didn't enforce it.

[fol. 271] That is the way I understand the statute.

Exam. Disque: All right.

By Mr. Taylor:

Q. Now, throughout that journey between Memphis and Little Rock that morning, Mr. Jones, after Congressman Mitchell went up into the colored car, did he at any time complain to you or anybody else within your hearing about any foul or offensive odors?

A. No, sir.

Q. Or the allegedly dirty condition of the car?

A. No, sir.

Q. Or anything objectionable of that kind?

A. He made no complaint whatever about anything.

Q. Was there any disturbance of any kind in that car?

A. No, sir.

Q. You did not see anybody bring any drunks in that morning, did you?

A. No, sir.

Q. Were there some white people riding back in the compartment devoted to white people that morning?

A. Yes, sir.

Q. In the compartment devoted to white people?

A. Yes, sir.

Q. Did the Congressman that morning have any appearance of being sick?

A. He did not, no, sir; he did not to me.

[fol. 272] Q. Did he say he was sick?

A. No.

Q. Did you notice any conduct on his part that would indicate that he was in the slightest degree ill?

A. No, sir.

Q. In your conversations with him in the car, what was the Congressman's manner toward you?

A. Very gentlemanly. He never went out of his way, never talked noisy, or anything. He was very nice.

Q. He did not use any insulting language, did he?

A. No, sir.

Q. Or any abusive language?

A. No, sir, not a bit.

Q. No profane language?

A. No, sir.

Q. Was his voice loud?

A. No, sir.

Q. Raucous?

A. No, sir.

Q. How was it?

A. Just an ordinary tone.

Q. Yes. Now, how about you?

A. I just talked in an ordinary conversation, because there were people sleeping.

Q. Did you use any abusive language to him?

[fol. 273] A. No, sir, I did not.

Q. Were you angry at him?

A. No, sir.

Q. Did he say anything that would be calculated to irritate you?

A. No, sir.

Q. Or excite your anger?

A. No, sir.

Q. Did you use any profanity?

A. No, sir.

Q. Of any kind?

A. No, sir.

Q. Were there people in the Pullman car still in their berths, at that time?

A. Yes, sir.

Q. In the body of the car?

A. Yes, sir, in the body of the car, and in the compartments also.

Q. The first conversation that you had with him was, I understood you to say, in the hallway?

A. Yes, sir.

Q. That passes right alongside the compartments and the drawing rooms?

A. Yes, sir.

Q. And the ladies' toilet.

[fol. 274] A. Yes, sir.

Q. Were the compartments and the drawing rooms of that Pullman occupied at that time that morning?

A. Yes, sir.

Q. The Congressman did not mention the words "observation car" that morning, did he?

A. No, sir.

Q. He did not apply for any permission to ride in the observation car, did he?

A. No, sir.

Q. In the Pullman car that you were in that morning, your and the Congressman, where this transaction occurred: between each two berths, are there any partitions out in the body of the car that we are talking about—headboards?

A. I believe that there are in those cars now. I think they have been reconditioned.

Q. Were they in this car at that time?

A. I am not positive; I don't remember; but there are now.

Q. I see.

A. They still have that same car.

Q. Do you recall the name of that car?

A. Lake Catherine, is the name of the car.

Mr. Westbrooks: Pardon me. I did not get that.

The Witness: Lake Catherine.

Mr. Taylor: Just a moment.

[fol. 275] By Exam. Disque:

Q. Where did that come from; Chicago?

A. Chicago to Hot Springs.

By Mr. Taylor:

Q. Now, based on your experience, Mr. Jones, are there more white people who ride that train than there are colored people——

A. Yes, sir.

Q. —who ride that train.

A. Oh, yes.

Q. Could you give us any idea of the proportion, the number of colored to the number of whites who customarily ride that train?

A. Well, for the last year or so, we have had about—we have handled about 20 whites to one colored.

Q. On that train?

A. On that train, yes, sir.

Q. And you have answered that, so far as your knowledge goes, one or two colored persons in the Pullman per year——

A. Yes, sir.

Q. (Continuing) —would cover the amount of travel in Pullmans.

A. Yes, sir.

Q. Are the accommodations on that train devoted to colored people, adequate to care for the amount of travel of colored people?

A. Yes, sir.

[fol. 276] Mr. Westbrooks: Just a moment. That is objected to. That calls for a conclusion.

Exam. Disque: He is showing the number of persons who ride, and the number of seats that there are in this particular car.

Mr. Westbrooks: That is objectionable for the reason that it is not a question of whether they have seats in that car for colored people. Our position is that first class passengers——

Exam. Disque: He asked him as to the amount, first.

Mr. Westbrooks: Well, but as first-class passengers, having paid the first-class fare, we contend that we can ride in the observation car, and in the Pullman car, and in the dining car, and not up there in the Jim Crow car, which is only for coach passengers.

That is my objection. We are contending that does not apply to us. We paid the first-class fare, and we are entitled to ride where the first-class passengers ride, in the observa-

tion car, in the dining car, and in the Pullman car, and not limited to that little Jim Crow car up there. So this is immaterial.

Exam. Disque: I understand all that, but this question was only as to the amount of seats available.

Mr. Taylor: That is all.

Exam. Disque: He has not gone into the other question [fol. 277] yet.

Mr. Westbrooks: Available to whom; first-class passengers?

Exam. Disque: It is their contention that if there were any seats available, their duty was completed.

He has only gone so far as to inquire about the number of seats available, and the number of people traveling.

Mr. Westbrooks: Available to whom, if the Examiner please?

Exam. Disque: To colored people.

Mr. Westbrooks: We are not claiming anything on the basis of colored people. We are claiming on the basis that we have paid the first-class fare.

Exam. Disque: He is putting in his defense.

Mr. Westbrooks: Well, but we contend that that is immaterial insofar as our first-class fare is concerned.

Exam. Disque: Well, we will get to that later. The only question now is as to the space that is available. Now, you can go into the other matter later. The only question is as to the space available.

Mr. Taylor: That is all.

Exam. Disque: That is all right. As I say, you can go into the other later.

Mr. Hughes: It is our contention, if the Examiner please, that for the volume of traffic, we are supplying an ade- [fol. 278] quate amount of equipment.

Exam. Disque: But Mr. Westbrooks wants you to go further, and explain why it is that you do not provide accommodations, not only of a sufficient amount, but of a kind equal to what the white people have?

Mr. Westbrooks: Yes. That is our contention.

Mr. Mitchell: Yes.

Mr. Westbrooks: For the same class of fare.

Exam. Disque: Yes.

Mr. Taylor: All right.

By Mr. Taylor:

Q. Mr. Jones, ordinarily, considering the number of colored persons who travel in Pullmans, on your train, are the drawing rooms and compartments ordinarily adequate and sufficient to take care of all of those who desire Pullman accommodations?

Mr. Westbrooks: Of course, the objection to that would be that "adequately" calls for a conclusion.

Mr. Mitchell: Oh, let him testify.

A. We have plenty of space, for all we are handling.

By Mr. Taylor:

Q. Considering the number of colored persons who want to ride in the Pullman cars, are the compartments and the drawing rooms, where you say you can put them——

A. Yes.

Q. (Continuing) —ordinarily sufficient to take care of that demand?

A. Yes, sir.

[fol. 279] Mr. Westbrooks: The objection to that is for this reason: we claim now, that they want to ride, and they can't buy a ticket; they refuse to sell them.

The witness has himself testified that he does not know how many people apply for tickets, who want to go on those trains.

Exam. Disque: He is only testifying as to what his experiences are within the car.

Mr. Taylor: That is all.

Exam. Disque: And he says that ordinarily he can accommodate the colored man who desires a drawing room or compartment.

The Witness: Yes, sir.

Mr. Taylor: No; more than that——.

Exam. Disque: He does not know whether people may ask the ticket agent, or not.

Mr. Taylor: No; more than that, if the Examiner please. Ordinarily he can accommodate in a drawing room or a compartment, the colored applicant for Pullman accommodations.

The Witness: Yes.

Mr. Taylor: And at the same time comply with the Arkansas law.

The Witness: Yes.

Mr. Taylor: Is that what you mean?

The Witness: That is the way I understand it, yes, sir. [fol. 280] Mr. Westbrooks: Well, my objection to that would be this, if the Examiner please, that a colored person buying a first-class fare is not compelled to spend money for a drawing room or compartment, when a white person who buys a first-class fare can have a seat, or a berth.

In the second place, it makes no difference what the laws of Arkansas are concerning intrastate passengers; because they are of no force and effect on interstate passengers.

Mr. Taylor: That is a pretty big decision, that counsel has just made there.

Mr. Westbrooks: Well, it is our contention, and the Supreme Court of the United States has said so.

Exam. Disque: What I want to find out——

Mr. Taylor: That is not in my books.

Mr. Westbrooks: You do not have the right books. Read mine.

Exam. Disque: Just a moment. What is the charge made against the colored man who rides in a compartment or drawing room from Memphis to Hot Springs? Is it the same as a white person would pay for a seat in the Pullman car?

By Mr. Taylor:

Q. Do you know?

A. If you will permit me to explain that in my own way——

Exam. Disque: Yes.

The Witness: If Mitchell had a lower from Chicago to Hot Springs, and if I had had a compartment vacant at [fol. 281] Memphis, I would have put him in there, and it would not have cost him another dime to ride in that compartment all the way to Hot Springs.

Mr. Taylor: In other words——

Exam. Disque: But he did not do that.

The Witness: No.

Exam. Disque: He bought a ticket to Memphis.

The Witness: I am giving you an illustration, if there had been a compartment, of what we would do for him.

By Mr. Taylor:

Q. State whether or not this is correct——

Mr. Westbrooks: Just a moment. Just for the purpose of the record, I want to move that that be stricken, that he would let him ride for nothing—or let a man ride for nothing who was able to pay first-class passage, while the poor devil who was not in a position to buy it, could not get anything.

By Mr. Taylor:

Q. State whether or not this is correct, Mr. Jones, to do away with a lot of language: when you have a drawing room, or a compartment available, you put the colored passengers in that compartment or drawing room?

A. Yes, sir.

Q. Leaving the door open, fronting out on the aisle?

A. Yes, sir.

Q. And then the passenger pays only a seat fare; is that correct?

A. Yes, sir, that is all.

[fol. 282] Q. Just the same amount that he would have paid for a seat in the body of the car.

A. Yes sir.

Mr. Taylor: May we have just a moment, if the Examiner please.

(A short intermission followed.)

Mr. Taylor: Cross-examine.

Exam. Disque: We will take a few minutes recess.

(A short recess was taken.)

Exam. Disque: Come to order, please. Proceed with the cross-examination.

Mr. Taylor: Just one or two more questions.

Mr. Westbrooks: Do I understand that counsel says he has some more questions?

Mr. Taylor: Yes.

Mr. Westbrooks: All right.

By Mr. Taylor:

Q. I want to ask you this, Mr. Jones: in your experience as a conductor on this train, did you ever enforce this Arkansas Separate Coach Law against any white passengers?

A. Yes sir.

Q. Well, tell the Examiner about some of your experiences, and what you did.

Mr. Westbrooks: Now, of course, merely for the sake of the record, so that if this is ever written up, if the Examiner [fol. 283] please, it will be in the record, what he enforced against white passengers, I do not think is material to the discrimination that we are complaining about, as a custom.

That is the point.

Mr. Taylor: I am trying to show equal enforcement of this Arkansas statute as against white and colored indiscriminately.

Exam. Disque: The statute is not involved here directly at all. The witness may answer that question. It will not be long, I take it?

Mr. Taylor: No.

The Witness: Do you want me to give you an experience that I have had, or just tell you whether I have or have not.

Mr. Taylor: Whether you have or have not.

The Witness: Yes.

By Mr. Taylor:

Q. I will ask you the direct question, have you made some white people leave accommodations devoted to colored people?

A. Yes sir.

Q. On this train?

A. Yes sir.

Q. Now, Mr. Jones, I believe you stated that the Rock Island has been in bankruptcy since 1933.

A. Yes sir.

Q. Have there been any gradual changes in the equipment [fol. 284] of these trains since that time?

A. Very much so.

Q. Tell the Examiner what has been done down there.

A. Well, at the present time we have a new combination car that is more up to date, for colored people, than the white coach that we had. It has a Waukesha cooling system; it has a nice ladies' toilet, and a men's toilet in each end of the car; hot and cold water; soap; towels; flush toilets, nice plush cushions,—a first-class up to date air-cooled car.

Q. Is that regular equipment?
A. Yes sir.
Q. On your two trains?
A. Yes, sir, regular equipment every day.
Q. At the present time?
A. Yes sir.
Q. And devoted to colored people?
A. Yes sir.
Q. How long has that equipment been on there?
A. Since sometime around the 1st of last July.
Q. This Waukesha air-cooled equipment,—what is that?
A. It is mechanical. It is not what they call an ice-cooling system; it is a new system that they have got.
Q. Is that the standard——
A. Standard equipment.
Q. —air-cooling device——
[fol. 285] A. Yes.
Q. —in use by the railroad?
A. Yes sir.

Exam. Disque: This car ought to be pretty thoroughly described, because it is the one upon which any discrimination finding must rest, and not the one that Mr. Mitchell rode in.

We must find out whether or not this car that is now in operation is a discrimination against the colored race.

Mr. Taylor: All right.

Exam. Disque: That should be thoroughly described.

Mr. Taylor: All right, sir.

By Mr. Taylor:

Q. Is the car which operates on your two trains, and which you say was put into service last July, a standard steel passenger coach?
A. Yes sir.
Q. With running gear and accessories in tiptop shape, so to speak?
A. Yes sir.
Q. Up to date?
A. Yes, sir, the latest model.
Q. You say that that car is air-conditioned?
A. Yes sir.
Q. Throughout.
A. Yes sir.

[fol. 286] Q. Let us have a little more detailed description of the toilets. You say that there is a toilet in each end of the car.

A. Two in each end of the car.

Q. Two in each end.

A. Yes sir.

Q. One for men and one for women?

A. Yes sir.

Q. Does that car have a partition?

A. Yes sir.

Q. Running through the center?

A. Yes sir.

Q. And it is divided, one end to colored passengers——

A. Yes sir.

Q. —and one end for white passengers?

A. Yes sir.

Q. And in each of those compartments of that car there are two toilets?

A. Yes sir.

Q. One for male and one for female?

A. Yes, sir. The car has four toilets.

Q. Are those toilets modern and up to date?

A. Yes sir.

By Exam. Disque:

Q. Flush or dry?

A. Flush.

[fol. 287] By Mr. Taylor:

Q. Are there washbasins in there?

A. Yes sir.

Q. Soap?

A. Soap.

Q. They are supplied with soap—and paper towels?

A. Towels, yes, sir.

By Exam. Disque:

Q. Free towels?

A. Paper towels.

Q. Free?

A. Yes sir.

Q. Or do you have to put a penny in the slot?

A. No, free; free towels, free drinking cups.

By Mr. Taylor:

Q. Each is supplied with ice water?

A. Yes sir.

Q. What is the floor covering?

A. It is something like linoleum,—congoleum, or something like that. It makes it more sanitary than the old carpet or rugs, that they used to have.

Q. What kind of seats?

A. Plush seats.

Q. Plush.

A. Yes sir.

Q. Do the- have these tidies, or bibs, or whatever you call them——

A. Yes sir.

[fol. 288] Q. Over the back end of them?

A. Yes, sir; seat covers.

Q. Yes.

A. Back covers.

Q. Yes.

A. That is what they call them.

Q. Linen?

A. Yes.

Q. White linen?

A. White linen back covers.

Q. Are they clean each trip?

A. Yes sir.

Q. Put on there clean?

A. Yes, sir, every trip.

Q. Are there any cuspidors in this car?

A. A few, yes, sir, just a few, for those who want to use them.

Q. Are the same kind of cuspidors in the colored end that there are in the white end?

A. Yes sir.

Q. Is that car that is devoted to colored people, which has been in operation there since July, in every respect equal to the coach provided for white people?

A. Yes, sir—and better.

Q. Did you say it was better?

[fol. 289] A. Yes, sir, I think it is, I consider it a better car.

Q. Why?

A. It is a newer car; more up to date.

Q. Well, each compartment on either side of this center partition is identical, is it?

A. Yes sir.

Q. Each compartment——

A. Yes.

Q. —is just exactly like the other.

A. The same, only there is a whole lot more room in the end for the colored people than there is for the white people. It is just the same in each end, however.

Q. Except——

A. (Continuing:) Only that there is more space in the one end than there is in the other.

Q. Are you familiar with similar equipment on other southern railroads?

A. No, sir. I haven't been on any other railroad in the community,—only the Illinois Central, that I came up on the other night.

Q. The trains of other railroads come into the Union Station there at Memphis, do they not?

A. Yes sir.

Q. Along with your train?

A. Yes sir.

[fol. 290] Q. Have you had occasion to observe the equipment——

A. Yes.

Q. —of the other railroads?

A. Yes sir.

Q. What lines?

A. Frisco and Illinois Central, in there.

Q. Well, how does this new car that has been put on there, compare with the equipment——

A. Very good.

Q. —similar equipment of those lines.

A. As good as any of them have.

By Exam. Disque:

Q. The car you have described runs every day, does it?

A. Yes sir.

Q. The same type of car, I mean.

A. How?

Q. The same type of car.

A. Yes sir.

By Mr. Taylor:

Q. And is it standard equipment, part of the standard equipment of that train?
A. Yes sir.

By Exam. Disque:

Q. Is it a new car——
A. Yes sir.
Q. —or an old car remodeled?
A. A new car.
[fol. 291] Q. Brand new equipment?
A. Yes, sir.

By Mr. Taylor:

Q. Is it brand new?
A. As far as I know it is, yes, sir,—it is brand new; anyway that is the way it appears to me.
Q. It looks brand new?
A. It looks brand new to me. I couldn't tell you when it was built, but I know it has been remodeled and made up to date, if it was remodeled; an up to date solid steel car.
Q. So that it could not be any better?
A. I don't think so.
Q. A brand new car would not be any better than this one?
A. Not a bit.
Q. Not any cleaner or nicer?
A. No, sir.

By Exam. Disque:

Q. When is it cleaned?
A. Sir?
Q. When is it cleaned, and how is it cleaned?

Mr. Taylor: I have got a man here to testify about that.
Exam. Disque: All right.
Mr. Taylor: Who superintends that job?
Exam. Disque: What does the Pullman car have that this car does not have? Is it the contention of complainant that you should have the same accommodations that are provided in a Pullman car?

[fol. 292] Mr. Westbrooks: And the observation car, too, —that belongs to the Rock Island,—that first-class passengers, or passengers paying that fare, can use.

Exam. Disque: How do you want the railroad to meet your complaint? What is the remedy you ask?

Mr. Mitchell: What we are asking, if the Examiner please is this, that a colored man, or passenger riding on a train, paying the first-class fare, shall have all of the accommodations that anybody else has.

The question of segregation is not involved. The law of the state of Arkansas, which has been put into the record here, provides that the passengers of the two races must be separated, but that the accommodations must be equal.

Now, we are contending that a colored man is entitled to everything that a white man gets, who pays a similar fare, on these trains.

Exam. Disque: Then, in order to meet your complaint, you want the railroads either to take off the Pullman car, or to put one on for you equally as good?

Mr. Mitchell: Absolutely. I want to ride in a Pullman just like these other lawyers here, if I have got the money to pay for it.

Exam. Disque: You do not care whether it is a Pullman car, or what?

Mr. Mitchell: I do not care how they arrange it; that is [fol. 293] their job.

Exam. Disque: You do not care whether it is a railroad car, or a Pullman car: You want a car that is equal to the Pullman car that is now operated and used by the whites?

Mr. Mitchell: That is not what I want. If I want to sleep, and there is a Pullman car for white passengers to sleep in, I want the same arrangement.

If there is a parlor car, where white passengers can sit in comfort, and watch the country as they go through, it is our contention that the law of the state of Arkansas says we must have it.

By Exam. Disque:

Q. What is this observation car, or chair car, or whatever it is? Is that a railroad car, Mr. Jones?

A. Yes, sir,—a parlor car.

Q. Who is entitled to use the observation car?

A. Anyone who has a first-class ticket, and pays that extra fare, they have an extra fare, and it is in addition to

your regular railroad ticket, which is the same seat fare as the Pullman car, a seat in the Pullman, which is 65 cents from Little Rock to Memphis, either way.

Mr. Taylor: Now——

Exam. Disque: Just a moment please.

Mr. Taylor: Pardon me

Exam. Disque: You not only want a Pullman car, but you want another car, an observation car, put on there?

[fol. 294] Mr. Mitchell: I want dining car accommodations also.

Exam. Disque: You want another observation car put on there, and you cannot mix them in the same dining car, so you want another dining car put on there.

Mr. Mitchell: Yes. If that is what they should do, under the law, let them pay the price, and give it to me.

Exam. Disque: I just want to get the issues clear.

Mr. Mitchell: Yes, sir. If they have passed a law that works that hardship on them, we want to take advantage of it.

Exam. Disque: Proceed.

By Mr. Taylor:

Q. A passenger, a Pullman car passenger, would not have any right, on his ticket, to ride in that parlor car, would he?

A. We would permit him to do that, so long as it did not interfere with somebody else's seat.

If the seats are all sold in there, then they have got to stay in the Pullman car; but if not, they can go back there; they have the privilege of going back in the parlor car.

Q. The parlor car is owned by the railroad company?

A. Yes, sir.

Q. And the Pullman car is owned by The Pullman Company.

A. Yes, sir.

By Exam. Disque:

Q. Is every seat in the parlor car sold,—or I mean, is it reserved for sale, or are there seats where people can go [fol. 295] out and look at the scenery?

A. No—in the body of the car, why, the seats are all numbered, and you sell them by number the same as you do berths, by number; but at the back end of the car, why,

anybody can go out there,—that is, who is privileged to ride in that car.

Q. You mean, on the rear platform?

A. Yes, sir.

Q. Sitting.

A. Yes, sir.

Q. Sitting on camp stools, and so forth.

A. Yes, sir.

Exam. Disque: Proceed.

Mr. Taylor: That is all.

Exam. Disque: Cross-examine.

Cross-examination.

By Mr. Westbrooks:

Q. Now, Mr. Jones, as I understand the procedure, in order to enable a white passengers to ride in the observation car, he must have what we call a first-class ticket. Is that correct?

A. Three cents per mile.

Q. Three cents per mile.

A. Yes, sir.

Q. And if he only has a ticket at 2 cents per mile, he can [fol. 296] only ride up there in that half of the Jim Crow car—up in that half of the car where the Jim Crow car is; isn't that correct?

A. Yes, sir.

Q. Now, then, if he has not got a first-class ticket, or a 3 cents per mile ticket, he cannot ride in the Pullman car, can he?

A. No, sir.

Q. Now, then, the only provision that the Rock Island has for carrying colored persons is in the Jim Crow part, that half of the car which you have described?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. Now, then, a man, a colored person, who has a first-class ticket, he is still compelled to ride in the Jim Crow car, is he not?

A. Yes, sir

Q. Is that correct?

A. Yes, sir.

Q. And if a colored person has a second-class ticket, that is at 2 cents per mile, he is compelled to ride in the same Jim Crow car, is he not?

A. Yes, sir.

Q. Now, then, if a white person has a 2-cents per mile [fol. 297] ticket, you say he can only ride in the Jim Crow car?

A. In his part of it.

Q. In his half of it?

A. Yes, sir.

Q. And if he has a 3 cents per mile ticket, he is entitled to use the Pullman, the diner and the observation car?

A. Yes, sir.

Q. That is what you call a first-class ticket, is it not?

A. Yes, sir.

Q. And the use of the Pullman car, and the dining car, and the observation car, is what you call first-class accommodation; is that not correct?

A. Yes.

Q. But you have no such first-class accommodation for negroes who are holding first class tickets on the Rock Island Railway, have you?

A. No, sir.

Q. Now, during the 32 years you said you worked over there they have never had any first-class accommodations for negroes available, have they?

A. No.

Q. What is the answer?

A. No, sir.

Q. They have not.

A. No, sir.

[fol. 298] Q. And they haven't that now, have they?

A. Not in sleeping cars, no, sir.

Q. They haven't any first-class accommodations for them——

Mr. Taylor: Just a moment, I object to the characterization of "first-class accommodations."

That is relative.

Mr. Westbrooks: Well, now——

Mr. Taylor: Ask him specifically——

Mr. Westbrooks: Pardon me.

Mr. Taylor: —whether we have this, that or the other thing, without using a broad characterization.

Mr. Westbrooks: I am only using counsel's own words. Counsel used the expressions "tiptop shape," "first-class condition," and so forth. Those are counsel's own words.

By Mr. Westbrooks:

Q. You haven't any accommodations for passengers, colored passengers, paying a 3-cent fare, permitting them to use your observation car on the Rock Island, have you?

A. No.

Q. What is the answer?

A. No.

Q. No. And they cannot use the dining car, can they?

A. No, sir.

Q. No. And they cannot use the sleeping car, can they?

A. No, sir.

[fol. 299] Q. Now——

Exam. Disque: But they can use the compartments in the sleeping cars, though.

The Witness: That is, if they have any.

Exam. Disque: If they have any.

The Witness: Yes.

Mr. Westbrooks: Well——

By Exam. Disque:

Q. What do you mean by "if they have any", Mr. Jones? Suppose there are four seats in a compartment, or six seats, or whatever it is. When is that full, when there are three in there, or when there are four in there, or five?

A. Four.

Q. What do you call "full"?

A. There are four seats in a compartment.

Q. Yes.

A. (Continuing) And you can seat about six in a stateroom.

Now, I said—and I want to correct that a little bit there. I said "if available".

Now, this man going down to Hot Springs, if he makes application, from Hot Springs to Chicago, he can get it, if it is not sold. They do not hold it, to wait and see if some white man is going to buy it. They will sell it to him.

By Mr. Westbrooks:

Q. Now, Mr. Jones, do you recall the kind of ticket that Congressman Mitchell had on the 20th of April, 1937?

[fol. 300] A. Yes.

Q. Or, the 21st of April, 1937.

A. Yes, sir.

Q. What kind of a ticket was that, sir?

A. Three cents per mile ticket.

Q. That is a first-class ticket, is it not?

A. Yes, that is a first-class ticket, what they call a first-class ticket.

Q. Now, then, there was room in the observation car, in the back of the observation car, was there not?

A. Yes, plenty of room.

Q. Plenty of room?

A. Yes, sir.

Q. You did not inform Congressman Mitchell that, his ticket being a first-class ticket, a three-cents per mile ticket, he had a right to occupy part of that first class accommodation which was furnished to white persons paying the same fare, did you?

A. No, sir.

Mr. Taylor: I object to that because there is no evidence that the Congressman ever applied to ride in the parlor car, or the observation car, or any part thereof.

Mr. Westbrooks: He did not have to apply. He bought a first class ticket.

[fol. 301] Mr. Taylor: My remarks are addressed to the Examiner.

Mr. Westbrooks: I am addressing myself to the Examiner also, counsel.

Exam. Disque: Are you through, Mr. Westbrooks?

Mr. Westbrooks: No, sir. Now, then, if the Examiner please, the proposition is that he has paid a first-class fare, and the railroad company has received his money, or part of it—The Rock Island Railway. The Railway Company has complete charge. That is their observation car, where persons who own first-class tickets, three-cents per mile tickets, tickets designated as first-class tickets, have the right to use and occupy the accommodations.

The evidence is that the complainant asked—or attempted to purchase first-class accommodations in the sleeper, in the Pullman car, where other first-class passengers would have purchased accommodations had they not been colored persons.

Mr. Jones was in charge of that train; he knew that there were first-class——

Mr. Hughes: Are we arguing the case at this time, if the Examiner please?

Exam. Disque: What is the purpose of this?

Mr. Westbrooks: No, I am just making my statement as to why I asked the question.

This observation car being part of the railroad equipment, it was the duty under the law, of Mr. Jones to have [fol. 302] furnished Congressman Mitchell with a first-class ticket, or first-class accommodations.

That was the reason for the question.

Exam. Disque: All right.

By Mr. Westbrooks:

Q. Now, Mr. Jones, how much are your tickets—or seats, in the observation car, from Memphis to Hot Springs?

A. 90 cents.

Q. Then, this dollar which Congressman Mitchell had in his hand at that time, would have been more than adequate to have paid for a seat in the observation car; is that correct?

A. Yes.

Q. Now, then, how much were the seats in the Pullman car from Memphis to Hot Springs, Arkansas?

A. 90 cents.

Q. The same fare?

A. Yes, sir.

Q. Now, then, you said that the Congressman was sitting in section 3?

A. Somewhere along in there; I am not positive.

Q. Somewhere in there?

A. Yes, sir.

Q. There was nobody else sitting in that section?

A. No, sir.

Q. Nobody else but the Congressman, was there?

[fol. 303] A. No, sir.

Q. And as a matter of fact, do you not know, Mr. Jones, that no one else occupied that section 3; no one had bought section 3 from Memphis to Hot Springs on April 21st?

A. Well, I didn't know whether they had or not. I didn't have the diagram, and I couldn't tell. The porter had it.

Q. Pardon me?

A. The porter handled the diagram.

Q. Yes.

A. And I didn't know whether that berth had been sold or not.

Q. Well, whether it had been sold or not, you would not have sold a seat in section 3, or any other space in that Pullman car, to Congressman Mitchell, would you?

A. No, sir.

Q. Because he was a colored person; is that correct?

A. Yes, sir.

Q. You saw his ticket was an interstate ticket from Chicago, did you not?

A. Yes, sir.

Q. To Hot Springs and return?

A. Yes, sir.

Q. A round-trip ticket.

A. Yes, sir.

Q. Now, you said that you know the law of Arkansas.

A. I have read it.

[fol. 304] Q. The separate coach law?

A. Well, I have read it.

Q. You stated to your counsel that you knew it.

A. I have read it.

Q. But you do not know it, though, do you?

A. No. I am not any lawyer.

Q. No. Now, do you know that the first clause of that Separate Coach Law says that all railway companies carrying passengers shall provide equal accommodations for colored and white?

A. Yes.

Q. Do you know that?

A. That is what it says.

Q. You know that?

A. Yes, sir.

Q. Now, then, that second-class coach up there, the Jim Crow coach, which is called the Jim Crow car down there, has "For Negroes" or "For Colored", or something like that, does it not?

A. Yes, sir. "For Colored."

Q. "For Colored."

A. Yes, sir.

Q. Would you say that that is equal to the accommodations furnished in the observation car by The Rock Island Railway to white passengers holding first-class fares?

[fol. 305] A. No.

Q. It is not?

A. No, sir.

Q. Would you say that the Jim Crow accommodations are equal to the facilities and accommodations furnished in the Pullman car, to white passengers who pay first class fares?

Mr. Taylor: That is objected to because of the word "equal." If he means by "Equal" similar in kind, all right. But the word "equal" is a very indefinite and relative kind of term, and may depend upon a great many things.

Exam. Disque: The record will show a description of the cars, and the Commission can determine whether or not they are equal.

Mr. Westbrooks: Yes.

Exam. Disque: The witness—just a moment.

Mr. Westbrooks: Pardon me.

Exam. Disque: The witness should state in what way a Pullman car is better, or provides any better accommodations, than the new coach which now runs, if it is better.

Mr. Westbrooks: I perfectly agree with you. I was merely using the language of counsel, Mr. Taylor, in speaking about first-class, as being equal in every respect; and even better; equal to and better than, I was just using his language. I understand that the facts should be adduced.

By Mr. Westbrooks:

Q. Now, Mr. Jones, will you describe the difference [fol. 306] in the toilets that are in the observation car of train 45, run by the Rock Island, and the toilets in the Jim Crow car, that colored men and women occupy, or use.

A. Well, the toilets in the parlor car, and in the middle partition of the Jim Crow car, are about the same.

Q. The same as the toilets in the observation car?

A. Yes, sir. They have a washbasin and towels.

Q. The same kind of washbasin?

A. Practically; I wouldn't say just exactly.

Q. Well, now, what is the difference in the washbasins in the observation car and in the Jim Crow car? There is a difference, isn't there?

A. Well, I couldn't say whether there is or not. I know they all answer the same purpose, but whether they are made out of the same material or not, I couldn't say.

Q. Now, then, is there any porter service in the observation car?

A. Yes, sir.

Q. Is there any porter service, the same kind of porter service, in the Jim Crow car, or the Jim Crow section?

A. No, sir.

Q. What is the answer?

A. No.

Q. Now, then, Mr. Jones, I believe you stated that on this train, the first car, I believe is the Jim Crow car; is that correct?

[fol. 307] Mr. Hughes: Following the baggage car.

A. Yes.

By Mr. Westbrooks:

Q. And you said there are two or three partitions——

A. The car we have now has two partitions,—or one partition.

Q. One partition?

A. Yes, sir, and two compartments.

Q. Two compartments.

A. Yes, sir.

Q. Now, then, this car that was in use in April of 1937: you recall that vividly, do you not?

A. I recall it.

Q. Will you describe that car. How many partitions were in that car?

A. Three compartments.

Q. Three partitions?

A. Two partitions; three compartments.

Q. Now, I believe you said, sir, that there was a toilet on the front end.

A. Yes, sir.

Q. That is, for smokers—for colored men?

A. Yes, sir.

Q. And there was no running water in that, in April?

[fol. 308] A. No.

Q. And no washbasin, or towels?

A. No.

Q. And the smoker, on the back end, for white men——

A. The same way.

Q. There was no running water, and no towels in there?

A. Right.

Q. Now, then, Congressman Mitchell, I believe you said, was occupying the smoker—or the compartment where the ladies were?

A. The compartment where the ladies were.

Q. Did you say that there was running water in April, 1937, in that toilet, in that middle compartment?

A. Yes, sir.

Q. Were there towels that were furnished?

A. Yes, sir.

Q. Hand towels?

A. Paper towels.

Q. Paper towels?

A. Yes, sir.

Q. Now, what kind of towels were there in the observation car—what kind of towels were furnished in the observation car at that time?

A. Paper and linen both.

Q. Paper and linen?

[fol. 309] A. Yes, sir.

Q. Now, you said that the toilet in the part where the Congressman was sitting, with the ladies, was a ladies' toilet?

A. Yes sir.

Q. Did it have up there "For Ladies"?

A. "For Women."

Q. "For Women."

A. Yes sir.

Q. Now, then, the man who was sitting in there who wanted to use some water, where would he have to go,—a colored man?

A. He didn't have any.

Q. He did not have any.

A. No, sir.

Q. Now, then, you said that you sat in the colored car, the colored coach, that is, the Jim Crow portion there, from Forrest City to Little Rock; is that correct?

A. Yes.

[fol. 310] Q. Now, there was room in the smoker, was there not, where the colored men were?

A. Yes sir.

Q. You did not have your things in there, did you?

A. Where.

Q. The smoker in front where the colored men smoked.
A. Yes, sir, that is where I sat.
Q. That is where you sat?
A. Yes sir.
Q. Now, where was a white smoker in the back, was there not?
A. Yes sir.
Q. You never used that one, did you?
A. No, sir.
Q. You were up in the colored part all the time?
A. Yes sir.
Q. That takes up two seats, does it not?
A. Yes sir.
Q. How many seats were occupied at that time?
A. Oh, I think they had about five or six passengers at that time.
Q. Well, how many seats did that leave, when you were occupying two whole seats?
A. Well, I think there are 22 in that end of the car.
Q. Is that now, or then?
A. Then.
[fol. 311] Q. 22?
A. Yes sir.
Q. 22 seats.
A. In that one compartment.
Q. Now, in the next compartment?
A. 20.
Q. Now, in the third compartment?
A. 22.
Q. Then that would make 64 seats, would it?
A. Yes sir.
Q. In that Jim Crow car.
A. Yes sir.
Q. Now, then, the seats which you have at the present time: Are they upholstered in the same manner as the seats in the observation car?
A. Yes, sir—practically the same material.
Q. No. Is it the same material?
A. They are just as nice.
Q. No. Just answer the question, if you know.
A. I couldn't say.
Q. Do you know whether it is the same material or not?
A. I don't know.

Q. Now, then, the carpet on the floor: Do you have a carpet there, a runner, in the colored section?

A. A runner.

[fol. 312] Q. A runner.

A. Yes.

Q. What if you know—what is on the floor of the Pullman car of that train?

A. Carpet.

Q. That is covered all over with carpet, is it not?

A. Yes sir.

Q. And your observation car?

A. Yes sir.

Q. That is covered all over with carpet, is it not?

A. Yes sir.

Q. So that there is a difference in the covering of carpet on the floor, is there not?

A. Yes sir.

Q. Now, then, you said that they have leather seats now—leather backs, or something.

A. In the cars that they have now?

Q. That is the car that Congressman Mitchell was in.

A. Yes.

Q. That he was riding in.

A. Yes, leather seats.

Q. Now, you said—counsel asked you if something was in first class condition. Do you recall—I believe you said that meant that it was clean.

A. Yes.

[fol. 313] Q. That is all you meant by "first class condition"?

A. Yes sir.

Q. Now, then, you were asked about the volume of business there, and you said that in thirty-two years you only had ten or twelve persons, colored persons, riding in Pullman cars, in that time.

A. That is all.

Q. Did you sell them that accommodation?

A. No, sir.

Q. Did you ever sell any colored man any accommodations?

A. No, sir.

Q. Now, you said that one or two had applied to you—about one per year, or something like that, for accommodations?

A. Yes.

Q. And you refused them on account of their color, did you not?

A. On account of the law.

Q. Well, on account of their color; that is the idea, it it not?

A. That is the law.

Q. Yes. Now, Mr. Jones, you were not sitting near the toilet in the ladies' room, were you?

A. No. I was in the other compartment.

Q. In the women's room, I mean.

A. No. I was sitting back from that partition.

Q. That was how many seats from the toilet?

[fol. 314] A. That would be about ten or eleven seats; about ten.

Q. Did you notice that men who were in there were using the toilet between Memphis and Hot Springs—or Little Rock?

A. No, I didn't notice anybody using it. We didn't have very many to use it.

Q. You did not go in there and use it, did you?

A. I don't think so.

Q. Then you do not know what the fumes were that were in the toilet, or whether it was in odorous condition or not, so you?

A. I didn't smell any where I was sitting.

Q. You did not go and look and look into it and inspect it, did you?

A. Well——

Q. To see whether it had been used or not?

A. I did before I left Memphis.

Q. Well, now, after the toilet was used there, where there was no water, how was it cleaned out, and by whom?

A. Well, they have a kind of disinfectant that they put up in a can over it, that comes down in it.

Q. Well, that slowly drops down.

A. Yes sir.

Q. Drop by drop, does it not?

A. Yes, sir—it drops down.

Q. But I mean, to wash the toilet out; it is not washed out——

A. No.

[fol. 315] Q. —from the time it leaves Memphis until the time it reaches its destination, is it?

A. No, sir.

Q. Now, you say that you have seen ten or twelve colored people riding in a Pullman car from Memphis to Hot Springs in thirty-two years?

A. In compartments.

Q. In compartments?

A. Yes.

Q. You did not put them out, did you?

A. No, sir.

Q. Now, you have nothing to do with the charge that is made by the Pullman Company for Pullman service, have you?

A. Nothing.

Q. And when you said that you would put—that you would have put the Congressman in there at the expense of the Pullman Company, just what did you mean?

A. I meant that it was up to the porter to collect whatever he wanted to.

Q. Well, now, then, the Congressman was sitting in section 5, and no one was there. Did you tell the porter to collect his fare from there on, the Pullman fare?

A. No.

Q. For the seat in section 3, at least?

A. No.

[fol. 316] Q. Now, then, counsel asked you if you had any instructions from the Rock Island Railway Company, or the trustees, or anything like that. As a matter of fact by virtue of your being the conductor of that train, you have charge of the entire train; is that not correct?

A. Yes.

Q. And being the conductor for the Rock Island Railway Company—that is what you were—it is your duty to enforce the law as you think it is?

A. Yes.

Q. The law of Arkansas—is it not?

A. Yes.

Q. And as such conductor you were trying to enforce the law——

A. Yes.

Q. (Continuing) —when you had Congressman Mitchell leave that first class accommodation, and go to the Jim Crow car, were you not?

A. Yes.

Q. The answer is "yes"?
A. Yes.
Q. Now, you said, sir, that after Congressman Mitchell left, or had been put out of the Pullman and put into the Jim Crow car, he did not come to you and complain?
A. No, sir.
Q. He did complain about having to leave this Pullman [fol. 317] car, did he not?
A. Well, that is the complaint that he stated.
Q. He protested?
A. As I stated.
Q. He showed you his ticket?
A. Yes.
Q. And he told you that he was able to pay for the accommodation, did he not?
A. Yes.
Q. But you told him that he was a colored man——
A. Yes.
Q. —and that he couldn't ride in there?
A. Right.
Q. Now, sir, if there had been a white passenger with a first class ticket who had boarded your train at Memphis for Hot Springs, and had asked for a berth or a seat in that car, where there were vacant seats, ~~or a~~ seat in the observation car, would you have sold him a seat?
A. Yes sir.
Q. Now, you have no knowledge yourself, have you, of how many colored people apply for Pullman tickets in the ticket office there in Hot Springs, to ride back to Chicago, and are refused, have you?
A. No, sir.
Q. You never have over one drawing room and one com- [fol. 318] partment in that Pullman car, have you?
A. We have two compartments and one stateroom.
Q. Two compartments?
A. Yes sir.
Q. And one stateroom.
A. Yes sir.
Q. If one person takes that stateroom and one person each takes a compartment, then only white persons are sold—or permitted to ride in the body of the sleeping car.
A. Yes sir.
Q. That is, the Pullman car.

A. Yes sir.

Q. And no colored persons are allowed by you to ride even on first class tickets, in the observation car?

A. Right.

Q. Is that correct?

A. Yes sir.

Q. As passengers.

A. Yes sir.

Q. Those are your orders from the Rock Island Railway Company, are they not?

A. Those are the rules of the railway.

Q. Those are the rules?

A. Yes sir.

Q. And you were following the rules of the company?

[fol. 319] A. Yes, sir.

Q. Now, when you said that you would have permitted him to ride in the Pullman car for nothing, you did not mean that?

A. Oh, no.

Q. No.

A. I have nothing to do with that part of it.

Q. That is correct. You have nothing to do with the Pullman Company's collection for that?

A. The only thing is, if he had a Pullman ticket all the way to Hot Springs you could put him in a compartment, and he is not charged any extra fare for that, from there on.

Q. Well, when you put them in a compartment, you leave the door open, and sell other seats in there, do you not, to colored persons?

A. Not necessarily. We leave the door open.

Q. Well, in other words, when you put a man who only has a seat from Memphis to Hot Springs in there, you put other passengers in there, do you not, colored passengers?

A. (No answer.)

Q. If you have got a colored man in there, and you sell him a seat, sell it to a colored passenger——

A. I didn't sell him anything in there.

Q. No, but I mean, now, if there is a colored person who has a through ticket, as you say, and you put him in one of the compartments, that is only for a seat, is it not?

[fol. 320] A. That is all.

Q. And if other colored passengers want a seat, they have to go into the same compartment that the first colored man is in; is that correct?

A. Yes.

Mr. Taylor: Did you say "yes"?

The Witness: Yes.

By Mr. Westbrooks:

Q. Now, then, when you say you do not sell colored people anything, who sells the tickets for the observation car that is run by the Rock Island Railway?

A. The ticket agent.

Q. The ticket agent.

A. Yes, sir.

Q. You never sell them, I understand you to say?

A. Oh, yes, sometimes.

Q. Then you do sell tickets on that train for observation seats—seats in the observation car?

A. If a fellow gets on there without a seat, and has got a first class ticket, I sell him a parlor ticket—or seat.

Q. I see. But you would not sell a colored man a parlor car ticket?

A. No.

Q. If he got on with a first class ticket?

A. No, sir.

Q. And the white people and colored people are charged [fol. 321] the same for that three cents per mile ticket, are they not?

A. Yes.

Q. There is no difference, simply because a man is colored?

A. No.

Q. Now, you said you made a white person leave the colored car in enforcing that law?

A. Yes, sir.

Q. If he had a first class ticket, and was in the Jim Crow car, he could go out into the Pullman car and sit down, by paying the Pullman fare, could he not?

A. Yes.

Q. The Pullman car is a better equipped car than the Jim Crow car, is it not?

A. Yes.

Q. Now, then, if he went in there—if you put him out of the Jim Crow car, and he went into the Pullman car, you sent him into the Pullman car, he would not have to purchase a compartment, he would not have to occupy a compartment, would he?

A. No, sir.

Q. Or a drawing room?

A. No, sir.

Q. He could buy a seat?

A. Yes, sir.

Q. In the Pullman car.

A. Yes.

[fol. 322] Q. Or in the parlor car?

A. Yes.

Q. The only requirement is, his having a first class ticket?

A. Yes.

Q. A three cents per mile ticket.

A. Yes, sir.

Q. Now, you were asked something about bankruptcy. You said you knew about the road going into bankruptcy?

A. Yes.

Q. You have got your pay regularly, have you not?

A. Yes, sir.

Q. Now, I believe you said something about the equipment of this train, sir, that there is a combination coach—you said there was a day coach. What does that day coach consist of?

A. A straight car, without any partitions in it.

Q. Who occupies that?

A. White people.

Q. What kind of tickets do they hold?

A. Two cents per mile, two cent tickets.

Q. That is, second class tickets?

A. Well, that is what they call them.

Q. Yes.

A. Two cents.

Q. And then they occupy the entire car, do they?

[fol. 323] A. Yes, sir.

Q. Colored people cannot ride in that car?

A. No, sir.

Q. On second class tickets?

A. No.

Q. Nor on first class tickets?

A. No, sir.

Q. But all of the colored people must stay in that half of the car, the Jim Crow car, if they ride on your train?

A. Yes.

Q. No matter what kind of ticket they have?

A. Yes.

Q. Now, then, I believe you said that under the new arrangement, in that one car, you only have one partition in it now?

A. Yes, sir.

Q. And the front end is for——

A. Colored.

Q. For whom?

A. Colored.

Q. Colored people.

A. Yes, sir.

Q. Men or women?

A. Both.

Q. Both.

A. Yes, sir.

[fol. 324] Q. The back end is for what?

A. White people.

Q. White.

A. Yes, sir.

Q. Men or women.

A. Either one.

Q. Either one.

A. Yes, sir.

Q. But mostly men?

A. Well, anybody can ride there who wants to. It doesn't make any difference to me.

Q. It does not?

A. No.

Q. And it may be men or women?

A. Yes, sir.

Q. But they must have a ticket.

A. Yes, sir.

Q. Now, then, where do the colored people go to smoke now, since they have only got one compartment for men and women, and they are all together in that same compartment?

A. Right there.

Q. They must smoke right there, the men and women, under the arrangement that you have?

A. Yes. They do that over the train now, anyway.

Q. Well, I mean there is no place provided for a colored [fol. 325] woman to smoke in?

A. Except——

Q. Except in the smoker, where men are smoking, and chewing tobacco, or anything else?

A. Yes, sir.

Q. And that is the only accommodation you have for colored people who pay a first class fare?

A. That is all.

Q. Three cents per mile.

A. Yes, sir.

Q. Now, then, that day coach that you spoke of for white people: Does that have a smoker in it?

A. No.

Q. How many toilets has it?

A. One in each end.

Q. One in each end?

A. Yes.

Q. For men and for women?

A. Yes, sir.

Q. What seats?

A. They are plush seats.

Q. How about carpet?

A. Yes, sir, there is carpet on the floor.

Q. Carpet all over the floor?

A. No, it is a runner.

[fol. 326] Q. Is that called a chair car?

A. A day coach.

Q. A day coach.

A. Yes, sir.

Q. And you have hand towels in there, have you?

A. Paper towels.

Q. Only paper towels in there?

A. Yes, sir.

Q. And those white people who are compelled to ride in that car, only pay two cents per mile, do they not?

A. Yes, sir.

Q. And those who pay three cents a mile, where do they ride?

A. Well, they can ride in there, too, if they want to.

Q. But do you not have any other accommodations for them?

A. They can ride in the sleeper, or in the parlor car, by paying the extra fare.

Q. By paying the extra seat fare?
A. Yes, sir.
Q. Now, you have a dining car in that train, do you not?
A. Yes, sir.
Q. Who is permitted to go into the diner now?
A. White people.
Q. Only white people?
A. Yes, sir.
Q. And that is operated by the Rock Island Railway, is it not?
[fol. 327] A. Yes, sir.
Q. It runs from Memphis to the end of your run at Hot Springs?
A. Yes, sir.
Q. By the way, is that train 41-51—is that called the 41-51 train that leaves Memphis at 8:30?
A. 45-50.
Q. 45-51?
A. 45-50.
Q. 45-50.
A. 51 has nothing to do with that. 51 goes from Little Rock west.
Q. Yes.
A. 45 goes to Hot Springs.
Q. But that goes out of here with 45?
A. Yes, sir.
Q. And it takes some of the cars off 45 on west?
A. No, sir.
Q. It just makes a connection there?
A. Makes the connection.
Q. At Little Rock.
A. Yes, sir.

Mr. Westbrooks: All right. That is all.
Exam. Disque: Is there anything further?
Mr. Taylor: Just a moment further. Are you through?
Mr. Westbrooks: Yes.

[fol. 328] Redirect examination.

By Mr. Taylor:

Q. Now, about the present provision for smoking compartments on that train 45: Is there any separate smoking

compartment for white passengers in the white coaches, the coaches assigned to white people?

A. Well, they have a partition in this front car, if they want to go up there, and if they do not, they smoke where they are. Nine times out of ten they will never move out of their seats. They smoke there in the day coach.

Q. On that train, in view of the present vogue, people smoke wherever they please?

A. Yes.

Q. All over the train, do they?

A. Yes, sir, and I never question it.

Q. No objection is made to it?

A. I never question them any more.

Q. I want to ask you again, because I may have misunderstood one of your answers: Have you ever been given any instructions or directions, or any rules with reference to how you shall treat colored passengers in Pullman coaches, by the railway company?

A. No, sir.

Q. I understood you, and maybe I misunderstood you, somewhere in your examination to answer counsel that something was according to the rules of the company.

Were you referring there, or did you intend to refer there, [fol. 329] to your practice of undertaking to enforce the Arkansas Separate Coach law?

A. Oh, I get what you mean now. No. I meant, I was enforcing the law, not the rules of the company. It is not the rules of the company. It is the law, that I am enforcing, and not the rules of the company, because I have never had any instructions from any one on the railroad as to just how to handle these cases, so that it was left up to me.

Mr. Taylor: That is all.

Recross-examination.

By Mr. Westbrooks:

Q. Now, Mr. Jones, in order that we may all clarify the situation, if you were not the conductor, and an employe of the Rock Island Railway, you wouldn't undertake to be moving colored people out of anything on the train, would you?

A. If I wasn't what?

Q. If you were not the conductor.

A. No.

Q. And had charge of the train.

A. No.

Q. But as the conductor and in charge of the train, that is one of your duties as conductor, and in charge of that train, to keep the colored people and the white people separate?

A. Yes, sir.

Q. Now, then, you spoke about smoking a few minutes ago.

[fol. 330] A. Yes.

Q. In the body of the Pullman car they do not allow smoking, do they?

A. No.

Q. In the body of the car.

A. No.

Q. They have separate smoking rooms, have they not?

A. Yes, sir.

Mr. Westbrooks: That is all.

Redirect examination.

By Mr. Taylor:

Q. Do you know whether they smoke in the body of a Pullman car or not?

A. I don't think they allow that.

Q. You do not know?

A. Yes.

Q. Or do you know?

A. Well, I know that I was run out of one the other night. They don't allow that.

Q. Well, I have had a similar experience—to the contrary.

A. Well, that is just my experience. I am not familiar with the rules of the Pullman Company.

Mr. Taylor: All right. That is all.

Mr. Westbrooks: That is all.

(Witness excused.)

Exam. Disque: Call your next.

[fol. 331] Mr. Taylor: Mr. Scott:

Exam. Disque: Be sworn.

W. S. Scott, was sworn and testified as follows:

Direct examination.

By Mr. Taylor:

Q. Mr. Scott, give the reporter your full name and address.

A. W. S. Scott; 201 Mill Street, Malvern, Arkansas.

Q. In April——

Mr. Westbrooks: What town?

The Witness: Malvern.

Mr. Hughes: Malvern.

By Mr. Taylor:

Q. In April of 1937, were you employed by the trustees of the Chicago, Rock Island & Pacific Railway Company?

A. Yes, sir, I was.

Q. In what capacity, working for them?

A. Brakeman.

Q. Were you in your work assigned to train 45 on that day?

A. I was.

Q. Were you the head brakeman?

A. Yes, sir.

Q. Did you ride that train from Memphis to Little Rock on that day?

A. Yes, sir.

[fol. 332] Q. This is April 21st, 1937.

A. Yes, sir.

Q. During the course of that journey from Memphis to Little Rock on that morning, do you recall having seen this man over there, Congressman Mitchell? (Indicating.)

A. Yes sir.

Q. Where did you see him?

A. In the middle compartment of the Jim Crow car.

Q. In the middle compartment of what?

A. The Jim Crow car, they call it, or the combination car, —whatever you term it.

Q. That is a car assigned to colored people?

A. Yes sir.

Q. On that train.

A. Yes sir.

Q. Now, how much time—or, what is the time of that train between Memphis and Little Rock?

A. Two hours and forty-five minutes.

Q. How much of that time did you spend in the smoking car with Congressman Mitchell?

A. Well, I would say two hours.

Q. Do you recall the condition of that car on that morning with respect to its general layout?

A. Yes sir.

Q. And its cleanliness?

[fol. 333] A. It was clean.

Q. I say, do you recall it?

A. Yes, sir.

Q. Do you remember what it looked like?

A. Yes sir.

Q. Was the floor of that car clean that morning?

A. Yes, sir, it was.

Q. Were the cuspidors in that car clean?

A. They were.

Q. Do you know whether the toilets were clean or not?

A. Yes sir.

Q. Were they?

A. Yes sir.

Q. Did you experience, or smell any foul or obnoxious odors——

A. No.

Q. (Continuing:) —while you rode in that car that morning?

A. I did not.

Q. Was that car crowded with people?

A. No, sir.

Q. How many colored people would you say were in that car that morning on that trip?

A. I don't remember exactly, but there was three or four, or probably five, or something like that.

Q. Plenty of seats for everybody?

A. Yes sir.

[fol. 334] Q. What kind of seats were in that car?

A. Leather seats.

Q. Were there any linen backs on the seats?

A. Yes sir.

Q. Were those linen backs clean?

A. Yes sir.

Q. Where were they put on?

A. At Memphis.

Q. Is that the starting point of the run of that train?

A. Yes sir.

Q. And was it on that morning?

A. That is the starting point, yes, sir.

Q. Do you know whether or not that combination or colored car is cleaned between trips at Memphis?

A. Yes sir.

Q. Is it so cleaned?

A. It is cleaned every trip, at Memphis, and cleaned at Hot Springs, also.

Q. Did Congressman Mitchell at any time that you saw or observed him in that car, make any complaint of any kind or character to you or to anybody else within your hearing——

A. I didn't hear him say a word.

Q. (Continuing:) —about the condition of that car?

A. I didn't hear him say a word to anybody.

Q. He did not to you, did he?

[fol. 335] A. No, sir.

Q. You had on your regular uniform, did you not?

A. Yes sir.

Q. At that time?

A. Yes sir.

Q. The uniform of a brakeman on a passenger train?

A. Regular passenger uniform.

Q. A cap and blue coat?

A. The regular uniform.

Q. Was there any passenger in that car that day who made any complaint to you about odors?

A. No.

Q. Or any unsanitary condition?

A. No, sir.

Mr. Taylor: That is all.

Exam. Disque: Cross examine.

Cross-examination.

By Mr. Westbrooks:

Q. Now, let me get your name correctly, sir. What is the name again?

A. W. S. Scott.

Q. W. S. Scott?

A. Yes.

Q. Now, that number again; 201—I did not get the street.
A. Mill.
Q. Mill Street.
[fol. 336] A. Yes, sir.
Q. And what town?
A. Malvern.
Q. Malpern?

Mr. Hughes: Malvern.

By Mr. Westbrooks:

Q. Malvern, Arkansas?
A. Yes sir.
Q. Now, how long have you lived down in Arkansas?
A. In Arkansas?
Q. Yes.
A. About thirty-one years.
Q. And you never lived any other place, did you?
A. Oh, yes.
Q. Where was that?
A. Tennessee.
Q. Tennessee also?
A. Yes, sir,—France, Germany, Belgium, and all around.
Q. You have traveled all around?
A. Yes.
Q. Have you ever been to Chicago?
A. Yes.
Q. Before this time, I mean?
A. Yes, I have been there during the war.
Q. I see. That was some time ago.
A. It was.
[fol. 337] Q. Now, then, you have been a brakeman down there on the Rock Island for how long?
A. Well, it has been twenty-nine years last Christmas day.
Q. Twenty-nine years last Christmas day?
A. Yes sir.
Q. That you have been a brakeman down there?
A. Yes sir.
Q. And have you been running on 45 all the time, or most of the time?
A. I have been on there since September of 1936.
Q. Now, this run is every day, from Memphis to Hot Springs?

A. One way.
Q. One way?
A. Yes sir.
Q. Then where do you get off?
A. Well, the first day I get out of Little Rock to Hot Springs, and back to Memphis that night.
Q. Yes.
A. And the next day I come from Memphis to Little Rock, and I am relieved then for 24 hours, and catch the same train the next day.
Q. Now, then, you do not have anything to do with cleaning the toilets in the Jim Crow car, do you?
A. Not other than to report them when they are dirty.
Q. You do not do that yourself?
[fol. 338] A. How?
Q. You do not clean them?
A. No.
Q. You said there were four or five colored people, or colored ladies, in the compartment where the Congressman was riding?
A. I said I couldn't say just exactly how many, but I would say there were something like four or five.
Q. How many compartments were in that car?
A. Three.
Q. There were three in the car?
A. Yes.
Q. And he was in the middle one, you say?
A. He was in the middle, yes.
Q. Did you ride in the middle compartment?
A. I rode in the front compartment.
Q. Then you were not in the compartment where Congressman Mitchell was riding?
A. Just passing through.
Q. Well, I say you were not riding in that compartment?
A. No, I did not ride in there.
Q. No. You were in another compartment?
A. I rode up where the conductor was.
Q. And that was up in the smoker?
A. In the smoking end for colored passengers.
Q. In the smoking end for colored passengers.
[fol. 339] A. Yes, sir.
Q. There was no running water in the toilet up there, was there?
A. No, sir.

Q. So that if a colored man there, using the toilet, found it dirty, would it stay dirty until it got to Hot Springs, where it was washed up again, did it not?

A. Yes.

Q. Is that correct?

A. Well, I don't know if they wash them in Hot Springs; they do in Memphis.

Q. It stayed dirty until it got back to Memphis, then, where they do wash the toilets; is that correct?

Mr. Taylor: No, he did not say that.

Mr. Westbrooks: Just a moment. Let the witness answer.

Mr. Taylor: Do not assume that the witness said something——

Mr. Westbrooks: All right.

Mr. Taylor: —that the witness did not say.

By Mr. Westbrooks:

Q. Mr. Scott, you say you know that the cars are washed in Memphis,—or the toilets?

A. They are washed in Memphis, and thoroughly cleaned.

Q. After they make the round trip—is that correct?

A. Yes sir.

Q. But they are not washed in Hot Springs, or Little Rock, or some other place, are they?

[fol. 340] A. No. They just have a coach cleaner who goes through and cleans the inside of the coaches.

Q. But the toilets are not washed until they — back to Memphis?

A. Back at Memphis.

Q. Not until they get back to Memphis.

A. That is right.

Q. So, now, with reference to those four or five or six men there using that toilet: You did not go in there to see whether they used it or not, did you?

A. No, sir.

Q. You had no occasion to?

A. No.

Q. Your business was outside, as a brakeman?

A. Yes, sir.

Q. To flag the train, and such as that; is that correct?

A. If necessary, yes.

Q. Now, then, did you notice anybody else sitting in this middle compartment, except the Congressman?

A. If my memory serves me correctly, I think there was one or two colored ladies in there.

Q. Now, who told you that that was a Congressman sitting in there?

A. No one told me.

Q. You did not know him, did you?

A. No, I didn't.

[fol. 341] Q. You had never seen him before?

A. No.

Q. You just guessed that he was a Congressman?

A. No.

Q. How?

A. I didn't know who he was at that time. I just saw it in the paper; that was the first I knew of it.

Q. You saw it in what paper?

A. The Arkansas Gazette, I believe.

Q. Well, then, you did not see anything happen on that train, did you?

A. No.

Q. Who told you that the man sitting in that middle compartment was a Congressman?

A. I saw it in the paper.

Q. When?

A. A few days after that.

Q. It did not say that he was sitting in the middle compartment, did it?

A. No, but I knew his picture.

Q. Oh, you knew his picture?

A. Yes, sir.

Q. I see. Well, now, then, after he sat in the compartment there, during the two hours that you said you were riding inside of the car—that was up in some other com-

[fol. 342] partment, in the front compartment, you said?

A. Yes.

Q. You rode in the back smoker, too, did you not?

A. Well, I have sat down there, but very few——

Q. But you mostly rode up in the colored end?

A. I rode up in the front part all the time, except only when I was going back and forth through the train.

Q. I see. And when you go back and forth through the train, you open the door where the smokers are at both ends, do you not?

A. Yes.

Q. Where the colored ladies and the Congressman were sitting, was right between the two smoking compartments, was it not?

A. Yes.

Q. And you went through there quite often,—every time the train was stopped, did you not?

A. Oh, yes.

Q. And you had to open the door, going through?

A. Yes.

Q. To get out on the platform.

A. Yes.

Q. And that was the platform between this Jim Crow combination car and the next car?

A. Yes.

Q. Now, then, there is no colored porter up there in the [fol. 343] combination car, is there?

A. No.

Q. There is nobody to help the colored ladies move their baggage, and so forth, is there?

A. No—if they are crippled, yes.

Q. They do it themselves?

A. No, they don't.

Q. I say, ordinarily they do it?

A. Oh, yes; they move it around in the car.

Q. But not you. You were the brakeman.

A. Yes.

Q. You were busy looking after your brakeman's duties.

A. Yes.

Q. Now, then, do you ever have occasion to go back into the observation car?

A. I go back there, as a rule, three or four times in going over the road.

Q. There is a colored porter back there, to help those passengers, is there not?

A. The porter has charge of that car.

Mr. Taylor: I object to that, primarily to save time, but technically because it is not proper cross examination, and does not relate to anything asked on direct examination.

Mr. Westbrooks: Well, if I may reply, while primarily it would not be technically germane to the direct examination, [fol. 344] since there has been so much testifying by counsel on both sides, I would say, I think it is.

It is bringing out the truth, and I understand that is what the Commission is looking for.

Exam. Disque: That is correct, except that when you go beyond the direct examination, on your cross, you make him your own witness.

Mr. Westbrooks: Well, he is telling the truth, so that is all right.

Exam. Disque: All right.

By Mr. Westbrooks:

Q. Now, Mr. Scott, you say that you had your uniform on?

A. Yes.

Q. When you were passing through those cars.

A. Yes.

Q. And nobody complained to you?

A. No, nary a word.

Q. Now, in fact, the conductor is in charge of the train, is he not?

A. Yes, sir.

Q. And he came through there, did he not?

A. Yes.

Q. And he is the man to whom complaints are made, is he not?

A. Well, he is not the man that complaints are made to every time. Somebody is always hollering about something or other.

[fol. 345] Q. Somebody is always hollering?

A. It seems like it.

Q. In all the cars, they are complaining about something all the time?

A. No, I am not saying all the time.

Q. Now, you said that these backs were cleaned at Memphis?

A. Yes.

Q. The backs of the seats—or the covers, that is?

A. Yes; they were linen.

Q. Was that now, or back then?

A. Back then.

Q. Then.

A. And now, too.

Q. Now, what do they have in the observation car?

A. (No answer.)

Q. On their seats?

Mr. Taylor: I object to the question for the same reasons. I did not ask him a question about the observation car.

Mr. Westbrooks: All right.

Mr. Taylor: This man is trying to go back to Arkansas at six o'clock tonight.

Mr. Westbrooks: Well, I will excuse him, then, so that he may go right now. You may go back to Arkansas, Mr. Scott.

Mr. Taylor: All right.

(Witness excused.)

[fol. 346] Mr. Taylor: Mr. McGuire.

A. G. McGuire was sworn and testified as follows:

Direct examination.

By Mr. Taylor:

Q. Give the reporter your full name and place of residence, please.

A. A. C. McGuire; Little Rock, Arkansas.

Q. Are you employed by the trustees of the Rock Island Railway?

A. Yes, sir.

Q. Were you so employed in April of 1937?

A. Yes, sir.

Q. In what capacity were you employed in April, 1937?

A. I was mechanical foreman at Memphis, Tennessee.

Q. Tell the Examiner what the mechanical foreman at Memphis, Tennessee, does, in a general way?

A. I had charge of all of the equipment operating out of Memphis.

Q. Passenger equipment?

A. Passenger equipment, with reference to maintaining it, repairing it, supplying it, cleaning it, and so forth.

Q. You are familiar with train 45, are you?

A. Yes, sir.

Q. Also train 50?

A. Yes, sir.

Q. Did you have actual supervision of the cleaning of the [fol. 347] cars at the end of each trip of those two trains?

A. Yes, sir.

Q. Will you just describe the routine that you followed?
A. Well——
Q. What was done.
A. When the train arrives——
Q. At Memphis?
A. At Memphis.
Q. Yes.
A. (Continuing) —the soiled linen is all removed from the seats. The cuspidors are all taken out and put on a steam table,—from both cars,—and cleaned with steam; sterilized.
Q. What do you mean when you say "both cars"?
A. I mean, the day coach, the straight day coach, and the combination coach.
Q. Yes.
A. They both carry cuspidors. We take them all out, remove them from the cars, and clean them, and what we use is a steam table, to sterilize, clean and sterilize them in. The windows are raised, and the cars——
Q. Just before you go any further.
A. Yes?
Q. Are those cleaned and sterilized with steam?
A. Yes, sir.
Q. All right. Is there any difference between the cus-
[fol. 348] pidors that belong in one car or the other?
A. (No answer.)
Q. Are they all alike or not?
[fol. 349] A. They are all standard Rock Island cuspidors, and they all are assembled together on the table; and the ones that come out of one car, probably part of them will go back into another car, so far as that is concerned. They are not assigned to any special car.
Q. All right.
A. They are just simply all assembled on the cleaning rack, and cleaned.
Q. All right. Go ahead.

Exam. Disque: They do not have any cuspidors in the observation car, do they?
Mr. Taylor: I do not know.

A. (Continuing) The windows are raised, and the cars blown out; and the interior of the cars is wiped down. The floor is mopped with disinfectant, and so are the toilets.
The car is supplied with a fresh supply of towels,—those

toilets that are so equipped—and liquid soap, and drinking cups.

The coolers are removed also and sterilized. The coolers are of the standard railroad type, with a partition separating the ice and the water. They are freshly iced and watered.

Before the train leaves, new, fresh-laundered linen is placed on the seat backs.

By Mr. Taylor:

Q. Now, directing your attention to April 21st, 1937; was that method of cleaning followed with reference to the com-
[fol. 350] bination car in train 45?

A. It was.

Q. Do you yourself make a personal inspection of each train as it is made up before it begins its trip?

A. I do, yes, sir—or I did, rather, at that time. I am not on that job at the present time.

Q. I mean, all of my questions relate to April 21st, 1937.

A. Yes, sir.

Q. At the time what is called the combination car, the car assigned to colored people in train 45 on April 21st—at the time that car left Memphis, were the toilets of that car clean?

A. They were perfectly clean.

Q. Were the cuspidors clean?

A. Yes, sir.

Q. Was the floor of that car clean?

A. The floor was perfectly clean. As I stated, it was mopped; after the car had been thoroughly cleaned and wiped down on the inside, the floors were mopped and the cuspidors replaced.

Q. Was there clean linen on the back of each seat?

A. Yes, sir.

Q. In that particular car?

A. Yes, sir, throughout the car.

Q. Was there anything in that car that was either foul or unsanitary?

[fol. 351] A. No, sir, there positively was not.

Q. Were there electric fans in that car?

A. Yes, sir, there were electric fans in there, a 12-inch electric fan in each compartment.

Q. How about lights?

A. Electric lights.

Q. Now, will you describe the toilets that were located in that car?

A. Yes, sir.

Q. Just do that for the record.

A. In each end of the end compartments, is a toilet, what we call a dry toilet.

The center toilet, in the center compartment, is a flush toilet, with a washbasin, liquid soap and paper towels.

Q. And the two dry toilets, the one at the one end, and the one at the other, are——

A. Identical.

Q. —of identical type?

A. Yes, sir.

Q. The one at one end is for colored passengers?

A. Yes.

Q. The one at the other end is for white passengers?

A. Correct.

Q. And the flush toilet in the middle——

A. Is for colored women.

[fol. 352] Q. For colored women?

A. Yes, sir.

Q. Now, has there been any change since April 21, 1937, in the equipment of train 45?

A. Yes.

Q. What change?

A. Some time in the early part of July we put on a new——

Q. July, 1937?

A. Yes.

Q. Yes?

A. (Continuing:) We placed a new air-conditioned car, combination car, in that train, which is the same identical car as the day coach that is used exclusively for white passengers.

Q. Will you describe this new car that the colored people now use on train 45?

A. This new car that is used on train 45, is an all-steel car, six-wheel trucks, with a partition about one-third from the end of the car.

The large end is that used for colored passengers.

In each end of the car there have been placed toilet facilities, flush toilets, washbasins, liquid soap and towels.

Q. How many in each end, how many toilets?

A. Two in each end.

Q. Yes.

A. (Continuing:) And on the doors of those toilets, one [fol. 353] is stenciled "Women", and the other, across the aisle is stenciled "Men."

This car is an air-conditioned car, turned out of our Shawnee shops, with the general Waukesha air-conditioned equipment which is being used by many railroads over the country at the present time.

The car has plush seats, that are new. The floors are covered with a heavy linoleum, which makes them perfectly sanitary at both ends; and the floor is mopped each and every trip.

Q. Do you have any linen seat-backs in that car?

A. The seat-backs are supplied each trip before it departs—laundered linen.

Q. Is that car electrically lighted?

A. Yes, sir.

Q. At the time that car left Memphis on train 45 on April 21, 1937, it had been thoroughly cleaned prior to any passengers getting into it, had it?

A. Yes, sir.

Q. If that car got dirty between Memphis and Little Rock, or Hot Springs, Arkansas, the passengers made it dirty, did they not?

A. (No answer.)

Q. If it was——

A. It certainly wasn't dirty out of Memphis.

[fol. 354] Mr. Taylor: I will withdraw that question.

The Witness: It wasn't dirty leaving Memphis.

Mr. Taylor: All right.

The Witness: If it was dirty, I can't say what happened to it after it left Memphis.

Mr. Taylor: No.

The Witness: But I am positive it was clean when it left Memphis in 45.

By Mr. Taylor:

Q. You saw that car in person?

A. Yes, sir.

Q. After it was put into the train?

A. Yes, sir.

Q. At Memphis?
A. Yes, sir.

Mr. Taylor: That is all.
Exam. Disque: Cross-examine.

Cross-examination.

By Mr. Westbrooks:

Q. Now, Mr. McGuire, is it A. C. McGuire?
A. Yes.
Q. What is your street address in Little Rock?
A. 1315 McGowan.
Q. 1315 McGowan?
A. Yes.
Q. How long have you lived in the state of Arkansas, sir?
[fol. 355] A. I was transferred from Memphis to Little Rock December 1st.
Q. Of what year?
A. 1937.
Q. You lived in Memphis prior to that time, did you?
A. I did.
Q. And how long did you live in Tennessee?
A. Well, prior to going to Tennessee, I was in Arkansas. However——
Q. Were you born in Arkansas——
A. No.
Q. —or Tennessee?
A. I am a Tennessean.
Q. A Tennessean.
A. If that is of any information to you.
Q. Yes, I am glad to know that. Now, Mr. McGuire, you were in charge of all of the equipment there?
A. Yes.
Q. At Memphis?
A. Yes.
Q. Did you have any help?
A. What do you mean by "help" now?
Q. Well, I mean, do you do all of the cleaning of all of those cars yourself——
A. No.
Q. —individually?
[fol. 356] A. I don't do any of it myself.

Q. Well, now, what position did you occupy, did you say; mechanical foreman?

A. Yes.

Q. And did you have people under you?

A. Yes.

Q. That is, help.

A. I did.

Q. Or employes.

A. Yes.

Q. How many did you have, sir, to do the actual cleaning?

A. I had 8.

Q. 8 employes?

A. Yes.

Q. Who did the actual cleaning?

A. Right.

Q. And how many trains were your employes cleaning per day?

A. I believe at that time we were cleaning about 13 or 14 per day.

Q. Now, did you have an assistant, sir?

A. I did.

Q. An assistant foreman?

A. Correct.

Q. Who was your assistant foreman?

A. At that time I believe it was an employe by the name [fol. 357] of Browner. I am not positive about that.

Q. Mr. Browner.

A. Yes.

Q. That was in April of 1937.

A. Yes.

Q. What were the duties of your assistant foreman, Mr. McGuire?

A. My assistant foreman did some work himself.

Q. Yes.

A. But he didn't do any actual cleaning. He helped supervise the force, and assisted me.

Q. Well, now, what else, if anything did he do?

A. (No answer.)

Q. You say he did not do very much of the cleaning,—or no actual cleaning at all?

A. No.

Q. What else did he do?

A. Well, he inspected the trains, and so forth.

Q. Was that before or after the cleaning?

A. Well, in some instances that would be during the time that the cleaning was in operation, or in process.

Q. And while he was inspecting the trains, what work would you be performing, Mr. McGuire?

A. I was the foreman in charge.

Q. Yes, but what work, what actual work for the company would you be doing?

[fol. 358] A. I don't do any work.

Q. You drew your pay though, did you?

A. Surely.

Q. Now, did you look at that train on the 20th of April, 1937?

A. When?

Q. April 20th?

A. April 21st?

Q. No, April 20th.

A. Yes.

Q. You saw train 45?

A. Yes.

Q. Did you see it on the 18th?

A. I saw that train every day of the year. I made it a special duty to inspect that train inside.

Q. And the only cars that you inspected were that day coach, and that Jim Crow combination car?

A. No.

Q. Or was it——

A. The entire train.

Q. Did you clean the observation car also?

A. Right.

Q. Now, the observation car had different carpet than this Jim Crow car up there, did it not?

A. Yes, it did.

Q. It had different kinds of washbowls; is that correct?

[fol. 359] A. Than the Jim Crow car?

Q. Yes, different than the Jim Crow car had?

A. This combination car——

Q. Where the colored passengers, men and women, were?

A. This combination car had a white washbowl, as I recall it.

Q. Yes. I am speaking now about the observation car, where ladies and gentlemen who paid the first class fare rode?

They had a different kind of equipment in that car, did they not?

A. It was a different style of washbasin, because it was placed——

Q. Yes.

A. —in a different position.

Q. Yes. And they had different kinds of towels back there, did they not?

A. There were paper towels, in both cars.

Q. They did not have any linen towels in the parlor car?

A. Yes, they did.

Q. But they had no linen towels in the Jim Crow car, did they?

A. This combination car only had——

Q. No, answer the question, yes or no.

A. —paper towels.

Q. I say, they had no linen towels in the Jim Crow car, sir, did they?

A. They only had paper towels in the Jim Crow car.

[fol. 360] Q. I see. Now, then, they had liquid soap you said, in the Jim Crow car, did they?

A. I said they had liquid soap in the center toilet, the one where they had running water, a flush toilet.

I said that had liquid soap, a washbasin and paper towels.

Q. Now, that was the only place where—well, now, did you examine the Pullman car?

A. I did not.

Q. That was in that train?

A. No, I did not examine the Pullman car.

Mr. Taylor: I object to this examination for the same reasons as before stated. My questions were all restricted to this particular car, and its condition. The cross-examination should be confined to the same subject matter.

Mr. Westbrooks: He was the foreman, mechanical foreman of the entire train. That is the only reason I am asking him about it on this examination.

Mr. Taylor: But you are cross-examining.

Mr. Westbrook: That is cross-examination. Our point is not limited to the Jim Crow car. If he knows, or has information——

Mr. Taylor: But your cross-examination under the rules should be limited to the Jim Crow car. That is the rule of law.

[fol. 361] Mr. Westbrooks: I agree with you that it should be limited to matters strictly testified to by him——

Mr. Taylor: I submit that to the Examiner. I do not intend to argue back and forth with counsel.

Mr. Westbrooks: Well, when counsel has finished making his objection, then I will reply.

Exam. Disque: Proceed with the examination.

By Mr. Westbrooks:

Q. Now, the cuspidors that were used in the observation car, sir; did you clean those, or did you have them cleaned?

A. They were cleaned.

Q. And they were a different kind of cuspidor than was up in the Jim Crow car, were they not?

A. Yes, they were.

Q. Did you ever have anything to do with the cleaning of the cuspidors used in the smoking room of the Pullman car that was on that train, sir?

A. Not at all.

Q. You have seen them, have you not?

A. (No answer.)

Q. As you made your observation through the train?

A. No, I didn't see them.

Q. You do not recall having seen any cuspidors in the Pullman car?

A. The car——

[fol. 362] Q. Answer the question.

A. The Pullman car comes in on the Illinois Central, and is placed in the Rock Island train, and goes out, and I do not examine the interior of the Pullman car; but I do of the Rock Island cars.

I do that before the Pullman car arrives.

Q. Now, then, you said that the chairs in the observation car, sir, are upholstered. Are they?

A. I didn't say that, did I?

Q. Well, are they upholstered?

A. Yes.

Q. And they have smoking stands in the observation car —or, will you describe the observation car, sir. You made the inspection of it; it was under your supervision.

A. Describe it in what manner, now?

Q. As to its equipment, that is used in the observation car.

A. Well, the chairs are upholstered, yes.

Q. Is there any writing desk in the back there?

A. Yes, there is a small writing desk.

Q. A radio?

A. We placed a radio in the parlor car, but I do not just recall whether we had done it—whether we had placed it in the car at that time or not.

Q. Now, what would you say, sir, as to the comparison between this Jim Crow car, and the parlor car, insofar as [fol. 363] the comfort of the passengers riding in it was concerned, sir?

Would you consider it an equal comparison with the Jim Crow car?

Mr. Taylor: I object to this witness expressing any opinion on that question. He can describe the condition and layout of each car, but the conclusion should be drawn by the Commission.

Mr. Westbrooks: Well, my only reason is that counsel was permitted quite a leeway, and he finally got to the point where he stopped himself, and I said nothing, because we find out that the Commissio- will consider only competent evidence.

This man was the mechanical foreman, and this is a question as to the condition, the comfort and so forth, of the two cars. I am asking this man as an expert. He has been in that business, and he knows. I will qualify him, if there is any question about it.

By Mr. Westbrooks:

Q. Mr. McGuire, how long have you been a mechanical engineer?

A. I am not a mechanical engineer.

Q. Or, mechanical foreman?

Mr. Hughes: He stated that.

A. Well, I was mechanical foreman on this particular job from 1932 to 1937.

By Mr. Westbrooks:

Q. And you have had charge of—as mechanical foreman, [fol. 364] have you had charge of any other roads?

A. No; I have been on the Rock Island quite a long while.

Q. I see. That was a promotion in 1932, was it?

A. No.

Q. How?

A. Not necessarily.

Q. Were you working before, for the Rock Island, in some other capacity?

A. I was.

Q. In what capacity was that?

A. I was roundhouse foreman.

Q. Now, then, as mechanical foreman, why, you have had occasion to inspect the observation cars, the parlor cars, and the Jim Crow combination cars, have you not?

A. Yes.

Q. During that 32 years you have made repairs, and so forth, to all kinds of equipment of the road, have you not?

A. Yes.

Q. Now, sir, would you say that the Jim Crow car was equal in comfort for the passengers——

Mr. Taylor: Just a moment.

Mr. Westbrooks: Let me finish.

Mr. Taylor: I object for the reasons previously stated, and because he is calling for a conclusion, a matter of opinion of this witness.

Mr. Westbrooks: If the Examiner please, this is directly [fol. 365] based on his direct examination.

Mr. Taylor: He can describe the condition of the cars, but the conclusion is for the Commission.

Mr. Westbrooks: This man is an expert, and that is why he received his promotion.

By Exam. Disque:

Q. Have you ever sat in the seats of both cars?

A. How is that?

Q. Have you ever sat in the seats of both cars, so that you can say whether they are equally comfortable?

A. Well, the combination car has a leather seat, and the other cars are plush seats which are built and sold for a different price, and naturally I would say that they are intended to be more comfortable, anyway, whether they are or not.

Mr. Westbrooks: That is all.

Redirect examination.

By Mr. Taylor:

Q. The plush seats are hotter in the summer than the leather seats, are they not?

A. (No answer.)

Q. How?

A. Possibly so.

Mr. Taylor: That is all.

Exam. Disque: That is all, sir. You are excused.

(Witness excused.)

Mr. Taylor: That is all we have.

[fol. 366] Exam. Disque: Is there any rebuttal?

Mr. Westbrooks: Is there any evidence from The Pullman Company?

Mr. Roemer: No. As far as The Pullman Company is concerned, we want to renew our motion, made at the conclusion of the complainant's case in this matter, to dismiss the case as to The Pullman Company.

We do not intend to offer any evidence, or present any testimony.

Our motion is on the ground that there was no violation, as far as The Pullman Company is concerned, of any of the rules of the Interstate Commerce Commission.

Mr. Mitten: We want to renew the motion, as far as the Illinois Central Railroad is concerned, on the ground that the complainant has offered no evidence which would indicate that the Illinois Central Railroad violated the Interstate Commerce Act in any way.

Mr. Taylor: I renew the formal motion made on *on* the part of the Rock Island Railway and its trustees.

Exam. Disque: Of course, you people may be jointly guilty with the Rock Island.

Is there any rebuttal?

Mr. Westbrooks: I would like to recall Congressman Mitchell just for a few questions.

[fol. 367] ARTHUR W. MITCHELL, recalled, previously sworn and further testified as follows:

Direct examination.

By Mr. Westbrooks:

Q. Your name is Arthur W. Mitchell?

A. Yes, sir.

Q. You are the same Arthur W. Mitchell, complainant in this case, who was previously sworn and testified?

A. Yes, sir.

Q. You heard Mr. Jones state that there was no complaint made, and also the brakeman stated that there was no complaint made?

A. Yes.

Q. What, if anything, did you tell Mr. Jones at the time that you were ejected from the car, this Pullman car?

A. As I testified this morning, I told him that I was a first-class passenger, and I was entitled to first-class accommodations.

He said that they had no first-class accommodations that colored people could get on the train.

Mr. Taylor: That is mere repetition. That was testified to this morning in chief.

The Witness: That was their testimony.

Exam. Disque: He is rebutting it.

Mr. Westbrooks: Yes.

The Witness: (Continuing) And during the controversy, when he threatened to have me arrested, I told him that I was going to bring suit against his railroad just as quick as [fol. 368] quick as I could get back to Chicago; and he told me to bring suit, that he didn't care.

Mr. Westbrooks: That is all. Take the witness.

Mr. Taylor: No, thank you.

(Witness excused.)

Mr. Westbrooks: Nothing further to offer.

Exam. Disque: Who else desires to be heard; any one?

(No response.)

Exam. Disque: Off the record.

(Discussion off the record.)

Exam. Disque: Back on the record: briefs in this case will be due April 20th, 1938.

The free copy of the transcript will go to Mr. Westbrooks?

Mr. Westbrooks: Yes.

Exam. Disque: For the complainant; and for the defendants to whom? Mr. Hughes?

Mr. Hughes: Yes.

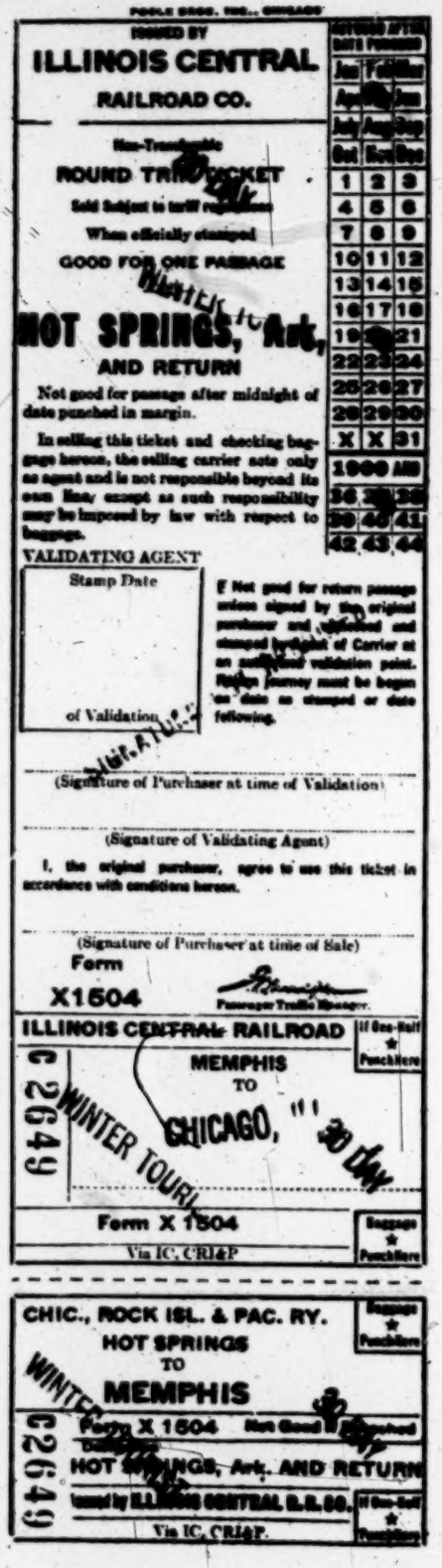
Exam. Disque: If there is nothing further, the hearing is closed.

(At 5:00 o'clock p. m., March 7th, 1938, hearing closed.)

(Here follow 2 photolithographs, side folios 369-370)

BLANK PAGE

EXHIBIT 1



ISSUED BY
ILLINOIS CENTRAL
RAILROAD CO.

Non-Transferable
ROUND TRIP TICKET
Sold Subject to tariff regulations
When officially stamped
GOOD FOR ONE PASSAGE
MEMPHIS, Tenn.
HOT SPRINGS, Ark.,
AND RETURN

Not good for passage after midnight of date punched in margin.

In selling this ticket and checking baggage hereon, the selling carrier acts only as agent and is not responsible beyond its own lines except as such responsibility may be imposed by law with respect to baggage.

VALIDATING AGENT
Stamp Date of Validation

If Not good for return passage unless signed by the original purchaser and validated and stamped by Agent of Carrier at an authorized validation point. Return journey must be begun on date as stamped or date following.

(Signature of Purchaser at time of Validation)

(Signature of Validating Agent)

I, the original purchaser, agree to use this ticket in accordance with conditions hereon.

(Signature of Purchaser at time of Sale)

Form X1504

Passenger Traffic Manager

ILLINOIS CENTRAL RAILROAD
If One-Half ★ Punchhere

MEMPHIS
TO
CHICAGO, Ill.
WINTER TOURIST
30 Days
C 2949

Form X 1504
Via IC, CRI&P
Baggage ★ Punchhere

CHIC., ROCK ISL. & PAC. RY.
Baggage ★ Punchhere
HOT SPRINGS
TO
MEMPHIS
WINTER
30 Days
Form X 1504 Not Good If Detached
HOT SPRINGS, Ark. AND RETURN
Issued by ILLINOIS CENTRAL R.R. CO.
If One-Half ★ Punchhere
Via IC, CRI&P
C 2949

21 CENTRAL 21 STATION APR 20 37 21 CHICAGO 21

21 CENTRAL 21 STATION APR 20 37 21 CHICAGO 21

21 CENTRAL 21 STATION APR 20 37 21 CHICAGO 21

21 CENTRAL 21 STATION APR 20 37 21 CHICAGO 21

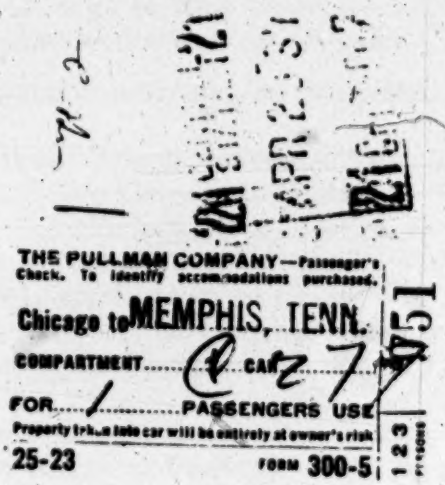
B7 21

369

204A

BLANK PAGE

EXHIBIT 2


THE PULLMAN COMPANY—Passenger's Check. To identify accommodations purchased.
Chicago to MEMPHIS, TENN.
COMPARTMENT
CAR
FOR 1 PASSENGERS USE
Property left in lobby car will be entirely at owner's risk
25-23
FORM 300-5
1 2 3 PERSONS

BLANK PAGE

[fols. 371-372] EXHIBIT 3

Chicago, Little Rock and Hot Springs

3 Daily The Louisiane		Table D Central Standard Time		4 Daily The Louisiane	
6.05 PM	Lv	Chicago, Ill	Ar	8.30 AM	
3.30 AM	Lv	North Cairo, Ill. (See Note A)	Ar	12.06 AM	
8.20 AM	Ar	Memphis, Tenn	Lv	7.40 PM	
45		(C. R. I. & P.)		50	
8.30 AM	Lv	Memphis, Tenn	Ar	7.30 PM	
11.15 AM	Ar	Little Rock, Ark	Lv	4.45 PM	
1.05 PM	Ar	Hot Springs, Ark	Lv	3.05 PM	

[fols. 373-377] THE LOUISIANE (Daily)

No. 3—Chicago to New Orleans—Table 1
No. 103-3—Louisville to New Orleans—Table 6

Sleepers (Regularly assigned, as described, are air-conditioned)
Chicago to New Orleans-Houston, Tex., 12-Sec.-D. R. (S. P. No. 3 New Orleans to Houston—Table A)
Chicago to Hot Springs, Ark., 10-Sec. 2 Comp.-D. R. (R. I. No. 45 Memphis to Hot Springs—Table 33).
Cincinnati & Louisville to New Orleans, 10-Sec. 2 Comp. D. R. (B. & O. No. 63 Cincinnati to Louisville—No. 103 Louisville to Memphis, No. 3 to New Orleans—Table 6).
Louisville to Paducah, Ky., 12-Sec.-D. R.
(May be occupied at Paducah until 7:00 a. m.)
Diners (Air-conditioned).
Chicago to Carbondale, Ill.
Fulton, Ky., to New Orleans.
Buffet-Lounge Car (Air-conditioned). Radio.
Chicago to New Orleans.
Chair Cars (Air-conditioned).
Chicago to New Orleans.
Louisville to New Orleans.
Coaches (Air-conditioned).

(Here follow 3 photolithographs, side folios 378, 379, 380-393)

BLANK PAGE

Illinois Central System

Chicago, Cairo, Memphis and New Orleans

READ DOWN — READ UP

9 Daily	27 Daily	35 Daily	3 Daily		+5 Daily	1 Daily	31 Ex.Sun	25 Daily	Mls.	Table 1	26 Daily	10 Daily	4 Daily	28 Daily	+6 Daily	36 Daily	32 Ex.Sun	2 Daily
										Central Standard Time								
11.05	✕ 8.45	7.30	8.05		1.50	9.00	7.30	1.39	0	Lv CHICAGO, Ill. Ar	4.00	7.15	8.30	8.50	9.00	9.50	4.10	9.30
m11.11	✕ 8.52	7.36	8.12			f9.07	f7.37		2.5	Lv 43d Street	3.45	7.03	8.17			9.39		9.18
11.14	✕ 8.55	7.39	8.17		1.06	9.10	7.40		4.5	Lv 55d Street	3.42	6.59	8.13	8.40	8.46	9.35	2.56	9.14
11.17	✕ 8.58	7.42	8.21		1.11	9.13	7.43		6.5	Lv 63d Street	3.41	6.54	8.10	8.38	8.43	9.32	2.53	9.10
m11.30		7.51	s8.31			s9.22	7.51		13.1	Lv Kensington	q3.28	w6-42	p7.50			9.22	2.39	8.56
m11.33		f7.56	s8.40			9.32	7.56		18.6	Lv Harvey		w6.33	a07.51			f9.15	3.28	8.51
							8.05		22.1	Lv Homewood							3.23	
		m8.06	m8.53				8.12		26.8	Lv Matteson	f8.10					f9.06	3.18	
										(Chicago Heights)								
						f8.15			27.9	Lv Richton								
						8.21			32.7	Lv Monee								
						8.29			39.0	Lv Peotone						f8.55	3.10	
					ab10.08	8.37			45.3	Lv Manteno						f8.50	3.01	
									49.4	Lv Indian Oaks						f8.43	2.53	
						8.46			52.8	Lv Bradley							2.43	
12.12	✕ 9.47	8.46	7.25		s2.07	10.17	8.57	2.43	54.4	Lv Kankakee	2.15	5.40	7.05	✕ 7.32	x7.40	8.30	2.37	7.52
									58.9	Lv Otto								
							9.09		62.9	Lv Chebanse						f8.16	2.23	
							9.15		67.7	Lv Clifton						f8.10	2.16	
							9.21		71.6	Lv Ashkum						f8.05	2.09	
							9.27		76.9	Lv Danforth						f8.00	2.02	
					ab10.47	9.40	9.40	3.25	79.7	Ar Gilman	1.33	5.05				7.56	1.56	7.10
					ab10.47	9.40	9.40	3.25	79.7	Lv Gilman	1.33	5.05				7.56	1.56	7.10
						9.45	9.45		82.3	Lv Onarga	1.22	5.05				f7.51	1.49	9.
						f9.52	10.00		86.2	Lv Del Key							1.44	
						10.08	10.08		91.6	Lv Buckley						f7.41	1.36	
						10.20	10.20		97.3	Lv Loda						f7.36	1.31	
					ab11.11	10.27	10.30	3.55	101.4	Lv Paxton	12.55	y4.37				7.30	1.24	6.40
						10.44	10.27		106.8	Lv Ludlow						f7.24	1.17	
					ab11.28	10.38	10.38	4.14	112.3	Lv Ranteul	12.37	y4.25				7.18	1.10	6.23
						10.44	10.44		117.5	Lv Thomasboro							1.02	
						f10.49	f10.49		121.1	Lv Leverett							f12.57	
1.20	✕11.05	10.20	9.55			11.40	11.00	4.35	126.4	Ar Champaign	12.15	4.10	5.40	✕ 6.15	6.17	7.00	12.50	6.05
1.27	✕11.10		9.55			11.50		4.50	126.4	Lv (Urbana)	11.55	4.00	5.30	✕ 6.08	6.00			6.55
								f4.57	130.5	Lv Savoy								
								5.07	135.7	Lv Tolono	11.38							6.36
								f5.14	140.4	Lv Pesotum	f11.28							
2.05						12.16		5.30	144.2	Lv Hayes								6.19
								f5.37	148.4	Lv Tuscola	11.16	y3.30						
								5.47	153.6	Lv Galton								6.05
								f5.55	158.4	Lv Arcola	10.57		y4.49					
								f6.02	162.1	Lv Humboldt	f10.47							
								6.10	166.0	Lv Dorans								4.46
2.33	✕11.53		10.08			12.47		6.30	170.9	Ar Matteson	10.36	3.05	4.33	✕ 5.23	x5.14			4.46
2.33	✕11.53		10.08			12.47			170.9	Lv	10.36	3.05	4.33	✕ 5.23				
								f6.40	177.8	Lv Aetna								4.26
								6.46	183.9	Lv Neoga	10.01							
								f7.00	189.7	Lv Sigel	9.50							4.05
3.04	✕12.20		10.55			1.22		7.10	197.8	Ar Effingham	9.40	2.26	3.58	✕ 4.55	x4.45			4.05
3.04	✕12.20		10.55			1.22		7.25	197.8	Lv	9.40	2.26	3.58	✕ 4.55				
								f7.36	204.3	Lv Watson	9.18							
								7.46	210.1	Lv Mason	9.10							
								7.53	213.2	Lv Edgewood	9.04							
								f8.00	217.1	Lv Lerlede	f8.59							
								8.10	221.7	Lv Farina	8.52							
								8.21	227.5	Lv Kinmundy	8.43							
								8.31	232.2	Lv Alma	8.32							
								f8.40	237.6	Lv Tonti	f8.24							
								9.00	242.9	Lv Odin	8.17							
4.08	✕ 1.26		12.33		6.00	2.28		9.18	250.9	Ar Centralia	8.00	1.20	2.55	✕ 4.00	3.45			3.09
4.13	✕ 1.33		12.35		6.05	2.33		9.28	250.9	Lv	7.46	1.17	2.46	✕ 3.55	x3.40			2.56
								f9.39	257.3	Lv Irvington	7.36							2.45
								f9.46	261.4	Lv Richview	7.25							
			12.55			2.53		9.58	264.5	Lv Ashley	7.13							
								f	268.6	Lv Radom	f							2.21
								f10.11	272.3	Lv Bola	6.54							
										(P. O.—Du Bois)								
								10.20	278.3	Lv Tamaroa	6.41							
			1.30			3.19		10.33	287.0	Ar Du Quoin	6.26	12.20	x1.57					1.51
			1.35			3.19		10.33	287.0	Lv	6.26	12.20	x1.57					1.51
								f10.43	291.7	Lv Dowell	6.11							
								10.49	294.0	Lv Elkville	6.05							
								f10.50	300.5	Lv De Soto	5.54							
5.13	✕ 2.32		1.55		7.10	3.47		11.08	306.7	Ar Carbondale	5.43	11.52	1.21	✕ 2.55	2.30			1.20
5.25	✕ 2.45		2.05		7.18	4.02		x11.28	306.7	Lv	5.20	11.42	1.21	✕ 2.50	2.25			1.10
									310.5	Lv Bonky Dell	f							
								f11.40	314.8	Lv Makanda	5.05							
								11.51	321.9	Lv Cobden	4.49							
					2.50	4.32		12.01	327.3	Lv Anna	4.36	11.14						12.39
										(Jonesboro)								
									331.8	Lv Baleom	4.22							
								12.17	336.5	Lv Dongola	4.11							
									339.4	Lv Wetaug	f4.04							
								12.29	343.2	Lv Ullin	3.57							
									347.6	Lv Pulaski	3.47							
									351.6	Lv Villa Ridge	3.37							
								12.53	354.8	Ar Mounds	3.30							
6.30	✕ 3.51		3.30	3.54	8.36	5.24		1.00	360.2	Ar North Cairo	3.22	10.26	12.11	✕ 1.44	↑ 20		3.00	11.50
Connecting	*with Motor*	*Service*	*provided*	*by Illinois*	*Central*	*System*	*be-*		363.6	Cairo, Ill. Lv	*Connecting*		*Motor*	*Service*	*provided*	*by Illinois*	*Central*	*System*
6.40	✕ 3.55		3.30	3.48	8.40	5.36		1.18	360.3	Lv North Cairo, Ill. Ar	3.12	10.25	12.06	✕ 1.39	1.15		2.55	11.45
						f6.53		1.34	368.9	Lv Wickliffe, Ky. Lv	2.50		x11.48					dd 1126
								1.47	377.1	Lv Bardwell	2.30		x11.34					
								1.58	383.9	Lv Arlington	2.18		x11.28					
								2.10	391.3	Lv Clinton	2.03		x11.15					dd 1049
								f2.24	396.9	Lv Crutchfield	1.51							
7.50			4.40	4.48		6.50		2.40	405.0	Ar Fulton	1.40	9.10	10.50				1.50	10.35
										(Cont'd on Pages 17, 18)								
			7.50		9.00	6.15		8.00	921.3	Ar New Orleans, La. Lv	5.10		8.30		1.00			8.30

For additional service Kankakee to Chicago (See tables 11 and 12.)

Chicago to Kankakee (See tables 11 and 12.)

Connecting with Motor Service between Cairo and Fulton. Through train from Chicago to Fulton (See Table 10). The Seminole to Fulton (See table 10). The Florida. Miami, Fla. Sleeping Car passengers only. The Louisiane. Through train from Chicago to Miami, Fla. (See Table 10). The Seminole from Florida. See table 10. The Florida. Through train from (See Table 10). The Louisiane. Miami, Fla. Sleeping Car passengers only. The Creole. Through train from Chicago to Miami, Fla. (See Table 10). The Seminole from Florida. See table 10. The Creole. Through train from (See Table 10). The Illini. Special Service Charge. Special Service Charges, page 65. The Illini. Special Service Charge. Special Service Charges, page 65. The Illini. Special Service Charge. Special Service Charges, page 65.

Illinois Central System

Chicago, Cairo, Memphis and New Orleans—Continued.

SB	WN	3 Daily	103 Daily	15 Daily	+5 Daily	1 Daily	25 Daily	Mls.	Table 1— Cont'd		26 Daily	4 Daily	104 Daily	+6 Daily	16 Daily	2 Daily	READ UP
									Central Standard Time								
		PM 6.05			PM 1.00	AM 9.00	AM 1.39	0	Lv CHICAGO, Ill. Ar		AM 4.00	AM 8.30		AM 9.00		AM 9.30	
		AM 5.10	AM 5.00	AM 4.55			2.50	405.0	Lv Fulton, Ky. Ar		PM 1.16	PM 10.40	AM 12.15		AM 1.45	AM 10.10	
							2.56	407.7	Lv Pierce, Tenn. Lv		1.00						
							f	410.3	Lv Harris		f						
		dd 3.25 5.31				7.20	3.06	414.0	Lv Gibbs		12.61	q10.20	v12.01				
							3.12	418.8	Lv Rives		12.43						
							f3.17	421.5	Lv Moffatt		f12.38						
							3.20	423.8	Lv Polk		12.35						
		dd 5.45				d7.41	3.28	429.2	Lv Obion		12.28	q10.01	v11.40				
						d7.47	3.34	433.0	Lv Trimble		12.22						
							f	437.0	Lv Templeton		f						
		dd 6.02				d7.57	3.49	440.5	Lv Newbern		12.12	q9.48					
		6.18	k5.55	k5.50		8.11	4.10	449.3	Lv Dyersburg		11.57	9.37	11.16			9.10	
							4.16	453.5	Lv Fowlkes		11.43						
							f	456.2	Lv South Fork		f						
		dd 6.30				d8.26	4.26	460.1	Lv Halls		11.33						
							4.28	462.8	Lv Gates		11.26						
							4.36	466.6	Lv Curve		11.21						
								469.1	Lv Flippin								
		6.48				8.45	4.44	472.8	Lv Ripley		11.13	q9.02	v10.42			p8.35	
							4.50	478.9	Lv Henning		10.58						
							f4.57	482.7	Lv Rialto		f10.53						
		7.10	k6.38	k6.33		9.10	5.07	487.5	Lv Covington		10.45	8.46	v10.26			p8.30	
								492.5	Lv Melrose								
							5.19	495.3	Lv Brighton		10.32						
							5.26	499.4	Lv Atoka		10.27						
							5.28	502.4	Lv Tipton		10.18						
							5.33	505.7	Lv Kerrville		10.12						
							s 5.40	509.2	Lv Millington		10.06						
							5.45	512.7	Lv Lucy		10.00						
							f5.56	518.9	Lv Woodstock		9.55						
							f6.00	519.9	Lv Felts		f9.49						
							f	521.3	Lv Frayser		f						
		8.14	7.30	7.25			6.13	525.9	Ar Poplar Ave		9.35					7.30	
		8.20	7.35	7.30	12.10	10.16	6.20	527.4	Ar MEMPHIS		9.30	7.40	9.36	9.30	11.20	7.35	
		AM	PM	AM	PM	PM	PM				AM	PM	PM	PM	PM	AM	
			3		+5	1	25		Grand Central Station		26		4	+6		2	
			AM		PM	PM	PM				AM		PM	PM		AM	
			9.00		12.20	10.46	6.50	527.4	Lv Memphis Ar		8.30		7.16	9.20		7.09	
							f7.10	534.3	Lv Raines		f8.12						
							f	535.6	Lv Whitehaven		f						
							f	537.0	Lv Scaife		f						
							f7.18	539.5	Lv Horn Lake, Miss		f8.02						
							f	541.7	Lv Alden		f						
							f7.26	545.2	Lv Nesbit		f7.50						
			ve9.39				7.33	549.0	Lv Hernando		7.40		vf6.34				
							f7.40	554.9	Lv Love		f7.39						
			ve 9.54				7.47	558.4	Lv Coldwater		7.23		vf6.20				
			ve10.04				8.00	564.2	Lv Senatobia		7.15		vf6.12				
							f	568.3	Lv McGehee		f						
			ve10.15				8.21	571.6	Lv Como		7.05		vf5.01				
			10.26			11.56	8.30	577.1	Lv Sardis		6.55		5.51			5.48	
							f8.37	581.8	Lv Tallahatchie		f6.42						
			ve10.40				8.47	586.3	Lv Batesville		6.35		vf5.36				
								590.2	Lv Shiloh								
							f8.56	592.0	Lv Courtland		f6.24						
							8.59	593.9	Lv Pope		6.21						
							f	596.8	Lv Nelson		f						
			ve11.11				f9.09	601.0	Lv Enid		f6.11		vf5.08				
							9.16	605.9	Lv Oakland		6.05						
							f9.21	611.2	Lv Tillatoba		f5.56						
							f9.27	614.7	Lv Scobey		f5.50						
							f9.34	619.3	Lv Hardy		f5.42						
								622.6	Lv Riverdale								
			11.43		2.22	1.02	9.45	626.6	Ar Grenada Lv		AM 5.30		4.37	7.17		4.39	
			11.53		2.27	1.17	10.00	626.6	Lv		11.00		4.32	7.12		4.33	
								630.2	Lv Tie Plant		f						
								631.2	Lv Glenwild		f10.52						
								634.3	Lv Elliott		f10.47						
							f10.18	638.5	Lv Duckhill		10.40						
								642.7	Lv Eskridge								
								646.6	Lv Sawyer								
			12.30			1.53	10.40	649.5	Lv Winona		10.20						
								653.0	Lv Foltz		f10.08						
								656.0	Lv Wood								
							f10.56	660.1	Lv Valden		9.55						
								664.5	Lv Beatty		f9.45						
							f11.09	670.1	Lv West		9.35						
								673.7	Lv Hoffman		f9.25						
			1.10			2.35	11.30	679.6	Ar Durant Lv		9.15						
			1.10			2.35	11.30	679.6	Lv		9.15						
							f11.42	687.5	Lv Goodman		8.55						
							f11.52	694.5	Lv Pickens		8.13						
								701.2	Lv Vaughan		8.30						
								705.6	Lv Way		f8.23						
									(For Allisons Wells)								
								709.2	Lv Davis Lv								
								714.8	Ar Canton, Miss. Lv		8.05						
									(Cont'd on Page 19)								
		7.30	2.00		4.18	3.25	12.25	714.8	Ar Canton, Miss. Lv		8.05	12.30					
		AM	PM		AM	AM	AM		(Cont'd on Page 19)								
		3.38	7.50		9.00	9.15	8.00	931.2	Ar New Orleans La. Lv		12.10	5.10					
		PM	PM		AM	AM	AM				AM	PM					

For schedules between Memphis and New Orleans via Y. & M. V. R. R.—See table 52.

For schedules between Memphis and New Orleans via Y. & M. V. R. R.—See table 52.

+Panama Limited. Air-Conditioned throughout. See table of special service charges, page 68.

Special service charge.

Consult ticket agent.

+Panama Limited. Air-Conditioned throughout. See table of special service charges, page 68.

Special service charge.

Consult ticket agent.

Illinois Central System

Chicago, Cairo, Memphis and New Orleans—Cont'd.

READ DOWN — READ UP

3 Daily	27 Daily	+5 Daily	1 Daily	25 Daily	Miles	Table 1—Cont'd.	24 Daily	4 Daily	+6 Daily	26 Daily	2 Daily
PM 6.05	.....	PM 1.00	AM 9.00	AM 1.29	0	*Central Standard Time* Lv CHICAGO.....Ill. Ar	.....	AM 8.30	AM 9.00	AM 4.00	PM 9.30
PM 2.06	AM 7.35	AM 4.21	AM 3.30	AM 12.30	714.8	Lv Canton.....Miss. Ar	7.55	2.30	5.25	12.25	2.05
.....	f7.51	.....	.....	.....	722.2	Lv Gluckstadt..... " Lv	f7.35	.....	.....	f12.12	.....
.....	7.58	.....	.....	.....	726.	Lv Madison..... " Lv	7.27	.....	.....	f12.05	.....
.....	8.03	.....	.....	.....	728.8	Lv Ridgeland..... " Lv	7.20	.....	.....	f11.59	.....
.....	8.08	.....	.....	.....	730.9	Lv Tougaloo..... " Lv	7.15	.....	.....	f11.55	.....
.....	.....	.....	.....	.....	735.2	Lv Northview..... " Lv	f	.....	.....	.....	.....
.....	.....	.....	.....	.....	736.0	Lv Azylum..... " Lv	.....	.....	.....	.....	.....
2.52	8.30	5.00	4.10	1.30	738.1	Ar	6.50	1.50	4.45	11.35	1.20
3.10	8.50	5.05	4.20	1.50	738.1	Lv Jackson..... " Ar	5.40	1.30	4.40	11.15	1.00
.....	f9.02				744.1	Lv Elton..... " Lv	f5.28	.....		.....	.....
.....	f9.10				747.3	Lv Byram..... " Lv	f5.22	.....		f10.59	.....
.....	9.22				753.9	Lv Terry..... " Lv	5.12	.....		f10.47	.....
3.46	9.40		4.50	2.25	762.5	Lv Crystal Springs..... " Lv	5.00	12.55		10.32	22.25
.....	f9.47				766.7	Lv Gallman..... " Lv	f4.50	.....		f10.23	.....
3.58	9.55		5.05	2.40	771.6	Lv Hazlehurst..... " Lv	4.41	12.40		10.15	12.10
						(For Brown's Wells)					
.....	f10.03				776.2	Lv Martinsville..... " Lv	f4.30	.....		f10.05	.....
.....	f10.12				781.7	Lv Beauregard..... " Lv	f4.23	.....		f9.59	.....
4.17	10.20		5.20	3.03	783.3	Lv Wesson..... " Lv	4.20	12.21		9.55	bb1160
.....	f10.30				787.7	Lv Montgomery..... " Lv	f4.10	.....		f9.45	.....
4.30	10.40		5.35	3.25	792.1	Lv Brookhaven..... " Lv	4.00	12.01		9.40	11.36
.....	f				796.1	Lv Hartman..... " Lv					
.....	f				798.4	Lv Thayer..... " Lv					
.....	f				799.6	Lv Cold Springs..... " Lv					
.....	11.00				802.2	Lv Bogue Chitto..... " Lv	f3.40	.....		9.17	.....
.....	f11.05				804.6	Lv Norfield..... " Lv	f3.37	.....		9.13	.....
.....	f11.13				808.5	Lv Johnston..... " Lv	f3.31	.....		f9.06	.....
.....	11.23		vv6.04		813.0	Lv Summit..... " Lv	3.22			9.00	cc1110
5.05	11.30	6.21	6.10	4.00	815.9	Ar	3.17	11.25		8.55	11.05
5.10	11.45	6.36	6.15	4.10	815.9	Lv McComb..... " Ar	3.12	11.20		8.50	11.00
.....	f				816.8	Lv South McComb..... " Lv					
.....	11.53			4.18	819.8	Lv Fernwood..... " Lv	3.02			8.38	
xx5.20	11.58		xx6.25	4.27	823.1	Lv Magnolia..... " Lv	f2.51	f11.09		8.32	a10.50
tx5.26	12.10			4.38	829.0	Lv Chatawa..... " Lv	ae	ae		f8.20	
.....	12.16			4.50	832.9	Lv Oyka.....Miss. Lv	f2.37	.....		8.12	
.....	f			f	835.4	Lv Greenlaw.....La. Lv				f	
yy5.40	12.31		xi6.45	5.05	838.0	Lv Kentwood..... " Lv	2.28	r10.47		8.00	
.....	f			f	838.7	Lv Kent's Mill..... " Lv				f	
.....	f			f	840.5	Lv Oak Hill..... " Lv				f	
.....	12.42			5.19	842.4	Lv Tangipahoa..... " Lv				7.48	
.....	12.50			5.26	845.9	Lv Fluker..... " Lv				f7.37	
.....	f12.58			f5.31	848.7	Lv Arcola..... " Lv				f7.31	
.....	1.01			5.35	846.8	Lv Roseland..... " Lv				7.27	
yy5.56	1.08		xi7.03	5.41	852.6	Lv Amite..... " Lv	2.05	10.25		7.22	x10.13
.....	f			f	853.3	Lv Guillett..... " Lv				f	
.....	f			f	855.3	Lv Shiloh..... " Lv				f	
.....	f			f	857.5	Lv Velma..... " Lv				f	
.....	1.25			5.56	858.8	Lv Independence..... " Lv	au	r10.13		7.10	
.....	1.35			6.08	863.0	Lv Ticklaw..... " Lv				f7.00	
.....	1.40			6.13	865.1	Lv Natalbany..... " Lv				f6.55	
6.20	1.55	7.39	7.30	6.30	867.9	Ar Hammond..... " Lv	1.37	9.59	2.07	6.45	9.61
tx6.27	2.07			6.38	872.7	Lv Ponchatoula..... " Lv	1.27	au		6.40	
The Louisiana	f2.22			f6.50	881.0	Lv Brader..... " Lv				f6.28	
	f2.26			f6.54	883.3	Lv Manchac..... " Lv	ae			f6.22	
	bc				884.1	Galva..... " Lv				bc	
	f2.37			f7.03	889.4	Lv Ruddock..... " Lv	ae			f6.11	
	f2.46			f7.09	894.0	Lv Napton..... " Lv				f6.04	
	f2.49		The Creole	f7.13	896.2	Lv Frenier..... " Lv		The Louisiana		f5.59	The Creole
					898.8	Lv 23½ Mile Post..... " Lv					
					900.0	Lv 21¾ Mile Post..... " Lv					
					900.5	Lv Tunity..... " Lv					
tx7.12	f2.57			f7.20	901.8	Lv LaBranch..... " Lv	au			f5.49	
	bc				906.5	Lv Fallon..... " Lv				bc	
	3.12			7.37	910.7	Lv Kenner..... " Lv				5.31	
					913.4	Lv Harahan Junct..... " Lv					
					915.8	Lv Shrewsbury..... " Lv					
7.40	3.25	8.50	9.05	7.50	918.8	Ar Carrollton Ave..... " Lv	12.17	8.37	1.07	5.17	8.37
7.50	3.35	9.00	9.15	8.00	921.2	Ar New Orleans.....La. Lv	12.10	8.30	1.00	5.10	8.30
PM	PM	AM	AM	AM			AM	AM	PM	PM	PM

Explanation of signs opposite figures in the schedules on pa 380–393
15 , inclusive.

206C

BLANK PAGE

[fols. 394-405]

45 AM			Rock Island Lines		50 PM	
.....	8.30	0	Lv Memphis.....Tenn.	Ar	7.30	.....
.....	9.32	44.8	Ar Forest City.....Ark.	Lv	6.21	.....
.....	10.00	69.2	Ar Brinkley..... "	Lv	5.52	.....
.....	11.15	132.9	Ar Little Rock..... "	Lv	4.45	.....
.....	11.25	132.9	Lv Little Rock..... "	Ar	4.40	.....
.....	w12.04	159.5	Ar Benton..... "	Lv	f 3.54	.....
.....	1.05	193.4	Ar HOT SPRINGS..... "	Lv	3.05	.....
	PM				PM	

Explanation of Signs

Note A—Connecting Motor Service provided by Illinois Central System between North Cairo and Cairo.

Note B—Rock Island train No. 45 stops at any station south of Little Rock, to leave passengers holding tickets from Illinois Central trains.

a Stops to discharge revenue passengers from points beyond Champaign.

d Stops to receive revenue passengers for Champaign, Ill., and scheduled stops beyond.

e Stops on signal to receive revenue passengers for Memphis and beyond.

f Stops on signal to receive or discharge revenue passengers to or from scheduled stops.

w Stops to discharge revenue passengers from Memphis and points beyond.

y Stops to discharge revenue passengers from south of Cairo.

Ft. Freight train carrying passengers.

Mx. Mixed train carrying passengers.

C. T. Central Time
E. T. Eastern Time

[fols. 406-410] EXHIBIT 4

[fols. 411-416] No. 45—Chicago-Hot Springs Limited—Daily

Observation-Parlor Car
- Memphis to Hot Springs

Sleeping Car
- Memphis to Hot Springs, 10 Sec., 1 D. R., 2 Comp. (From Chicago I. C. No. 3)

Dining Car
- Serving all meals

Coach
- Chicago to Memphis (I. C. No. 3)
- Memphis to Hot Springs

[fols. 417-428] Changing Class of Tickets

Passengers holding coach tickets (not special coach) who desire to use sleeping car or parlor car may have their rail tickets made valid for passage in sleeping cars or parlor cars on payment of difference between the one way first class rail fare and the one way coach fare applying between the points between which sleeping or parlor car service is availed of. Approximately the same charge will be made

on intermediate class tickets when standard sleeping c
or parlor cars are used. In addition, passengers will
charged the sleeping car or parlor car rate for the sp
occupied. Tickets designated "special coach" will not
honored in sleeping cars or parlor cars und · any circu
stances.

(Here follows 1 photolithograph, side folio 429-436)

BLANK PAGE

"Route of the Memphis-Californian"

Memphis, Little Rock, Oklahoma City, Amarillo, Tucumcari, El Paso and Los Angeles

Table 8 — READ DOWN / READ UP

REFERENCE NOTES	41 Daily	45-61 Daily	111 Daily	Mls.	(SEE NOTE 1) STATIONS Central Time	Alt.	112 Daily	62-69 Daily	42 Daily
	PM	AM	PM				AM	PM	PM
* Daily. † Except Sunday.	5.00	6.30	11.00	0	Lv. MEMPHIS, TENN. Ar	262	6.45	7.30	12.30
‖ Meals. n No agent					*Mississippi River*				
a Stops to receive (pay passengers for El Paso or beyond.	f 5.17			9	BRIDGE JCT., ARK.	227			
				9	HULBERT	214			f12.01
	f 5.24		See Notes 1 and 2	11	RICEVILLE n	213			
	f 5.32			14	MOUNDS n	209			
b Stops to discharge pay passengers from east of Little Rock and to receive for west of Haskell.				16	EDMONDSON n	208	See Notes 1 and 2	See Note 3	f11.50
	f 5.39	See Note 1		20	PROCTOR n	207			f11.45
	pk..			24	JONQUIL n	205			pk..
	f 5.43			26	HETH	204			f11.35
	pk..			31	WHITMORE n	204			pk..
	f 5.52			32	BLACKFISH n	209			
f Stops on signal	f 5.59			34	ROUND POND n	205			f11.26
	f 6.01			38	WIDENER	208			f11.20
					St. Francis River				
g Stops to receive pay passengers for stations where train is scheduled to stop.	f 6.05			41	MADISON	210			f11.17
	6.11	9.32	12.08	45	FORREST CITY	214	5 20	6.21	11.10
				49	BECKS n	214			
					L'Anguille River				
i Stops to receive pay passengers for Oklahoma City and beyond where scheduled to stop.	f 6.23			52	PALESTINE n	206			f11.00
	f 6.33			59	GOODWIN n	202			f10.50
	6.40			64	WHEATLEY	201			f10.43
	6.48	10.00	12.47	69	Lv. BRINKLEY 68 Ar	204	4.47	5.52	10.33
k Stops to discharge pay passengers from station where train is scheduled to stop.	f 6.55			74	EDEN n	179			f10.27
	pk..			76	DAGMAR n	179			pk..
	pk..			81	BRASFIELD n	183			pk..
					Cache River				
m Stops to discharge pay passengers from points east of but not including McAlester.	f 7.05			83	BISCOE	184			f10.15
					White River				
n Stops to receive pay passengers for McAlester or beyond.	7.12	See Note 1	See Notes 1 and 2	86	DeVALL'S BLUFF	187		See Note 3	10.05
	f 7.18			89	MESA 54-57	220			10.01
	7.23			93	HAZEN	229			9.54
r Stops to receive pay passengers for stations west of but not including Amarillo.	f 7.35			96	SCREETON n	234			f 9.47
	7.35			100	PRAIRIE CENTER n	236			
				103	CARLISLE	229			9.41
t Stops to discharge pay passengers from west of Amarillo.				106	McCREANOR n	224			
	7.47			112	LONOKE	239			9.30
	f 7.56			117	METO	234			f 9.22
	f 8.01			121	KERR n	240			f 9.17
v Stops to receive pay passengers for stations east of but not including McAlester.	f 8.07			125	GALLOWAY n	248			f 9.11
	h..			132	NORTH LITTLE ROCK n	257	yr		f 9.02
					Arkansas River				
A All Pullman.	6.25	11.15	2.05	133	Ar LITTLE ROCK 6-7-58 Lv	266	3.40	4.45	9.00
B Tourist and Chair Cars.	PM	11.25		133	Lv LITTLE ROCK 6-7-58 Ar	266		4.49	
		1.05		193	Ar HOT SPRINGS NAT'L PK. Lv	592		3.05	AM
C Stops to receive pay passengers for El Reno and beyond or to discharge pay passengers from Amarillo.		11.45	2.20	133	Lv LITTLE ROCK 6-7-58 Ar	266	3.30	4.35	
				139	Lv. TENTH ST. STA. n	393			
	f 11.59			142	PULASKI n	256		f 4.07	
	f 12.11			150	MAUMELLE n	262		f 4.22	
D Stops to receive pay passengers for Amarillo or to discharge pay passengers from El Reno or beyond.	f 12.15			153	PINNACLE n	265		f 4.26	
					Little Maumelle River				
					Big Maumelle River				
	f 12.20		See Notes 1 and 2	156	NATURAL STEPS n	268		f 4.43	
Q Stops to discharge pay passengers from west of Amarillo.	f 12.29			160	ROLAND n	280		f 4.52	
	f 12.39			167	LEDWIDGE n	282		f 5.02	
	f 12.44			170	KENNEY n	284		f 5.07	
Y Stops to discharge pay passengers from El Paso or beyond.	f 12.48			173	BIGELOW	293		f 5.11	
	f 12.56			177	HOUSTON n	299		f 5.19	
	f 1.06			184	PERRY	295		f 5.29	
	f 1.15			190	ADONA n	368		f 5.37	
	f 1.20			199	CASA	364		f 5.42	
	f 1.35			204	BIRTA n	352		f 5.51	
	1.45		4.25	229	OLA 58	354	1.22	2.23	
			* 6.05	223	Ar. DARDANELLE Lv	326		1.26	
				214	MICKLES n	330		f 2.14	
	f 2.05		f 4.43	220	DANVILLE	350	f 1.06	f 2.06	
					Petit Jean River				
	f 2.15			224	BELLEVILLE	368		f 1.58	
	f 2.25		f 4.58	229	HAVANA	375		f 1.68	
	f 2.35			235	WAVELAND n	458		f 1.41	
	f 2.45			240	BLUE MOUNTAIN n	507		f 1.33	
	f 2.55			245	MAGAZINE	466		f 1.24	
	3.10		5.40	252	Ar BOONEVILLE Lv	485	12.20	1.15	
	3.15		5.45	252	Lv BOONEVILLE Ar	485	12.15	1.10	
	f 3.25			260	BARBER n	498		f 12.53	
	f 3.35			264	ECHO	672		f 12.44	
	f 3.41			269	ABBOTT	628	f 1135	f 12.37	
	3.49		6.17	271	MANSFIELD	605	11.39	12.32	
	f 4.01		f 6.29	280	HARTFORD, ARK.	639	f 1116	12.17	
	f 4.12			288	MONROE, OKLA. n	528		f 12.05	

111 Daily	Mls.	(SEE NOTE 1) STATIONS Central Time	Alt.	112 Daily
PM				AM
9.15	761	Lv. AMARILLO 59 Ar	3666	8.05
f 9.32	766	SONCY n	3732	f 7.51
f 9.42	773	BUSHLAND n	3830	f 7.43
9.54	781	WILDORADO	3920	7.33
10.17	794	VEGA	4036	7.16
	796	ONTARIO n	4036	
10.40	808	ADRIAN	4045	6.57
f11.00	819	BOISE n	3999	f 6.39
11.15	832	GLENRIO	3854	6.25
11.23	836	Lv. ENDEE, N. M. n Ar	3826	6.18
f11.35	845	BARD n	3950	f 6.06
11.45	850	SAN JON	4027	5.59
		Barancos River		
		Rose Ho River		
f12.10	865	LESBIA n	3995	f 5.39
12.30	874	Ar TUCUMCARI (C.T.) Lv	4075	5.25
B 43 / 12.10	874	Lv TUCUMCARI (M.T.) Ar	4075	A 4 / 4.15
A 3 / 12.40				B 44 / 4.05
		Southern Pacific		
pk1.33 / pk1.56	933	SANTA ROSA	4599	pk3.01 / pk2.45
	1002	TORRANCE	5433	
4.38 / 5.10	1061	Ar CARRIZOZO	5438	11.45 / 11.30
5.53 / 6.24	1118	Ar ALAMOGORDO 2	4320	10.19 / 10.04
8.00 / 8.35	1205	Ar EL PASO Lv	3717	8.10 / 7.55
8.30 / 9.00	1205	Lv EL PASO Ar	3717	7.50 / 7.35
1.25 / 1.57	1422	Ar DOUGLAS	3966	2.55 / 2.32
5.00 / 5.35	1546	Ar TUCSON Lv	2386	11.30 / 11.10
f 7.25 / f 7.54	1644	CHANDLER	1173	f 9.11 / f 8.51
8.15 / 8.40	1667	Ar PHOENIX Lv	1082	8.25 / 8.05
12.50 / 1.05	1840	Ar YUMA (P.T.) Lv	139	4.30 / 4.10
7.15 / 7.30	2092	Ar LOS ANGELES Lv	293	8.15 / 8.10

Little Rock, Hot Springs and Malvern

Table 6 — READ DOWN / READ UP

631 Daily	45 Daily	Miles	(SEE NOTE 1) STATIONS	59 Daily		632 Daily
8.30	8.30	0	Lv. MEMPHIS Ar	7.30		7.30
11.15	11.15	133	Ar. LITTLE ROCK Lv	4.45		4.45
AM	AM			PM		PM
11.35	11.25	133	Lv LITTLE ROCK 6-7-58 Ar	4.49		4.29
f11.59		148	VIMY RIDGE n			f 3.48
12.09		155	BAUXITE			3.37
12.15		159	BENTON	f3.54		3.29
			Saline River			
12.22		165	HASKELL 7			3.21
PM	f1216	168	FRANCWAY n	f3.43		PM
687 Mix. Ex. Su	f1228	176	Ar. BUTTERFIELD 56 n Lv	f3.32	688	
		176	Lv. BUTTERFIELD 56 n Ar	11.00	688	
		239	Ar. CAMDEN Lv	†6.00	Mix. Ex. Su	
†6.00	0		Lv. CAMDEN Ar	9.05		
9.45	58		Lv. MALVERN Ar	4.30	7.20	
11.00	63		Ar. BUTTERFIELD 56 n Lv	†4.00	7.00	
4.00	f1228	176	Lv. BUTTERFIELD 56 n Ar	f3.32	7.00	
	pk. 180		COVE CREEK n	&..		
			Cove Creek			
f 4.30	f1242	185	PRICE n	f3.20	f 6.05	
	pk	187	LAKE CATHRINE n	&..		
		192	GULPHA n			
5.00	1.05	193	Ar HOT SPRINGS NAT. PK. Lv	3.05	5.30	

THE HOT SPRINGS at **Hot Springs National Park, Ark.**, are owned and controlled by the U. S. Government and recommended to its people. All Bath Houses and Attendants are under Government supervision. Ask nearest Rock Island representative for descriptive literature or address W. J. Leahy, Pass. Traf. Mgr., 723 La Salle Street Station, Chicago, Ill.

429–436

Equipment of all through trains is shown on pages 6 and 7

A. M. time shown in LIGHT face type; P. M. time shown in DARK face type

BLANK PAGE

[fol. 437] Changing Class of Tickets—Passengers holding coach tickets (not special coach) who desire to use sleeping car or parlor car may have their rail tickets made valid for passage in sleeping cars or parlor cars on payment of difference between the one way first class rail fare and the one way coach fare applying between the points between which sleeping or parlor car service is availed of. Approximately the same charge will be made on intermediate class tickets when standard sleeping cars or parlor cars are used. In addition, passengers will be charged the sleeping car or parlor car rate for the space occupied.

Tickets designated "special coach" will not be honored in sleeping cars or parlor cars under any circumstances.

(Here follows 1 photolithograph, side folios 438-441)

BLANK PAGE

PULLMAN SLEEPING CAR RATES OF FARE

As quoted by the Pullman Company and subject to change without notice.

PULLMAN SLEEPING CARS are owned and operated by the Pullman Company, are hauled on our trains under contract, and we are not responsible for the conduct of same or its employes. Our agents in selling Pullman tickets act simply as agents for the Pullman Company.

BETWEEN	Standard Car: Seat Fares	Double Lower Berth	Double Upper Berth	Sect'n two Passengers See Note 1	Sect'n one Passenger only	Drawing Room See Note 2	Compartment See Note 2
Cedar Rapids and St. Louis	$1.65	$2.00	$1.60	$4.00	$3.00	$3.00	.....
Chicago and Cedar Rapids	1.65	2.00	1.60	3.30	3.00	7.00	.....
Chicago and Chickasha		7.00	6.00			21.00	$17.00
Chicago and Colorado Springs and Denver		7.00	6.00	11.00	10.50	21.00	17.00
Chicago and Council Bluffs and Omaha ●	*1.00	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and Des Moines ●	1.40	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and El Paso		15.00	12.00	30.00	14.00	33.00	23.00
Chicago and Fort Worth and Dallas		7.00	6.00	11.00	10.50	23.00	
Chicago and Iowa City	.65	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and Kansas City	2.00	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and Lincoln		5.00	4.00	10.00	7.50	17.50	12.50
Chicago and Los Angeles, San Francisco, San Diego, Santa Barbara and Sacramento		15.75	12.60	31.50	22.00	52.50	44.00
Chicago and Palm Springs		15.00	12.00	21.00	21.00	52.50	42.00
Chicago and Moline, Rock Island, Davenport	.65	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and Peoria	.50	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and Phoenix		14.00	11.20	28.00	14.00	35.00	28.00
Chicago and Salt Lake City		10.00	8.00	14.00	14.00	35.00	28.00
Chicago and St. Paul and Minneapolis		2.00	1.60	4.00	3.00	9.00	
Chicago and Topeka and McFarland		5.00	4.00	10.00	7.50	17.50	12.50
Chicago and Tucson		12.00	9.60	24.00	16.00	42.00	34.00
Chicago and Washington	.50	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and West Liberty	.50	2.00	1.60	4.00	3.00	7.00	5.00
Chicago and West Yellowstone (via D. & R. G. W.)		10.25	8.20	16.40	14.35	35.00	29.00
Chicago and Wichita		5.00	4.00	10.00	7.50	17.50	12.50
Chicago and Yuma		14.00	11.20	28.00	19.00	49.00	39.00
Dallas, Ft. Worth and Des Moines		6.75	5.40	10.80	9.45	21.00	16.00
Dallas, Ft. Worth and St. Paul-Minneapolis		5.00	4.00	12.00	11.20	28.00	22.00
Denver and Colorado Springs to Davenport and Rock Island		6.00	4.80	9.60	8.40	21.00	17.00
Denver and Colorado Springs to Topeka and Omaha		4.25	3.40	6.80	5.95	15.00	12.00
Des Moines and Denver and Colo. Springs		8.50	6.80	13.60	7.70	20.00	16.00
Des Moines and Houston		6.25	5.00	12.50	11.00		
Des Moines and Kansas City	1.00	2.00	1.60	4.00	3.00	7.00	5.00
Des Moines and Omaha	.70	2.00	1.60	4.00	3.00	7.00	5.00
Des Moines and Omaha (Local Sleeper)		2.00	2.00	4.00	3.00		
Des Moines and San Francisco, Los Angeles and San Diego		14.25	11.40	22.80	13.85	35.00	28.00
El Paso and Rock Island and Davenport		9.00	7.20	18.00	13.50	34.00	27.00
Excelsior Springs and Chicago		5.00	4.00	8.00	4.50	14.00	11.00
Excelsior Springs and Minneapolis-St. Paul		5.75	4.60	9.20	5.25	14.00	11.00
Excelsior Springs and Ft. Worth-Dallas		4.75	3.80	7.60	6.25	17.00	13.00
Excelsior Springs and El Paso		7.50	6.00	11.00	10.00	28.00	22.00
Excelsior Springs and Los Angeles		12.25	10.00	21.00	13.00	47.00	37.00
Hot Springs and Chicago		5.00	4.00	8.00	4.50	14.00	11.00
Hot Springs and Denver		7.50	6.00	11.00	10.00	28.00	22.00
Hutchinson and Chicago		6.00	4.80	9.60	5.00	14.00	11.00
Kansas City and Chandler		10.25	8.20	16.40	14.35	35.00	28.00
Kansas City and Dallas and Ft. Worth		4.25	3.40	6.80	5.95	15.00	
Kansas City and Davenport and Rock Island	1.00	2.00	1.60	4.00	3.00	7.00	5.00
Kansas City and Denver and Colo. Springs		4.25	3.40	6.80	5.95	15.00	12.00
Kansas City and El Paso		7.50	6.00	11.00	10.00	28.00	22.00
Kansas City and El Reno	1.00	2.00	1.60	4.00	3.00	7.00	5.00
Kansas City and Houston		6.00	4.80	9.60	5.40		
Kansas City and Los Angeles, San Francisco and San Diego		12.25	10.00	21.00	13.00	47.00	37.00
Kansas City and Oklahoma City		2.75	2.20	4.40	3.00	10.00	8.00
Kansas City and Phoenix		11.00	8.80	17.00	13.00	33.00	21.00
Kansas City and St. Paul and Minneapolis		5.75	4.60	9.20	5.25	14.00	10.00
Kansas City and Tucson		9.75	7.80	18.00	13.00	35.00	27.00
Kansas City and Wichita and Hutchinson		2.50	2.00	4.00	3.00	7.00	5.00
Little Rock and Chicago		6.25	5.00	10.00	7.50	17.50	12.50
Little Rock and El Paso		7.50	6.00	12.00	10.00	27.00	
Little Rock and Kansas City		2.75	2.20	4.40	3.00	10.00	10.00
Little Rock and Los Angeles		12.25	10.00	21.00	13.00	47.00	
Maricopa and Chicago		12.25	10.00	21.00	13.00	47.00	37.00
Maricopa and Kansas City		10.25	8.20	16.40	14.35	35.00	29.00

BETWEEN	Standard Car: Seat Fares	Double Lower Berth	Double Upper Berth	Sect'n two Passengers See Note 1	Sect'n one Passenger only	Drawing Room See Note 2	Compartment See Note 2
Memphis and Amarillo		$ 6.00	$ 4.40	$ 8.80	$ 7.70	$20.00	.....
Memphis and El Paso		8.50	6.80	12.50	11.00	30.00	.....
Memphis and Hot Springs	.90	2.50	2.00	4.00	3.00	9.00	.....
Memphis and Los Angeles		14.50	11.60	22.20	20.00	51.00	.....
Memphis and Oklahoma City		2.75	2.20	4.00	3.00	14.00	.....
Memphis and Tucson		11.00	8.80	17.50	15.00	39.00	.....
Minneapolis-St. Paul and Cedar Rapids	$1.10	2.00	1.60	3.20	3.00	7.00	.....
Minneapolis-St. Paul and Chandler		12.75	11.00	22.00	15.00	40.00	320.00
Minneapolis-St. Paul and Phoenix		14.50	11.60	22.20	20.00	51.00	41.00
Minneapolis, St. Paul and Des Moines	1.00	2.50	2.00	4.00	3.00	9.00	7.00
Minneapolis-St. Paul and Houston		9.75	7.80	15.00	13.00		
Minneapolis-St. Paul to Rock Island, Davenport and West Liberty	1.25	2.00	2.00	4.00	3.00	3.00	.....
Minneapolis-St. Paul to Los Angeles, San Diego		15.75	12.60	25.20	22.00	56.00	44.00
Minneapolis-St. Paul and St. Louis		5.75	4.60	9.20	5.25	14.00	
Oklahoma City and Dallas and Ft. Worth	.90	2.50	2.00	4.00	3.00	9.00	
Oklahoma City and El Paso		8.50	6.80	13.60	7.70	20.00	
Oklahoma City and Los Angeles		11.00	8.80	18.40	16.00	41.00	
Omaha and Denver and Colo. Springs		4.25	3.40	6.80	5.95	15.00	12.00
Omaha and McFarland and Herington		2.00	2.00	4.00	3.00	9.00	
Omaha and Wichita		2.00	2.00	4.00	3.00	11.00	
Omaha and Caldwell		2.00	2.00	4.00	3.00	11.00	
Rock Island and Omaha		2.00	2.00	4.00	3.00		
Rock Island and Des Moines		2.00	2.00	4.00	3.00		
San Fran. and Los Angeles to Columbus Jct.		14.00	11.00	22.20	20.00	51.00	41.00
San Francisco and Los Angeles to Muscatine, Davenport and Rock Island		15.00	12.00	24.00	21.00	53.00	42.00
San Francisco and Los Angeles to Topeka		13.25	10.60	21.20	18.55	47.00	37.00
Santa Rosa and Chicago		8.00	6.40	12.80	11.20	28.00	22.00
Santa Rosa and Topeka		5.00	4.00	8.00	7.00	18.00	14.00
St. Louis and Alamogordo		8.50	6.80	13.60	11.90	30.00	24.00
St. Louis and Chandler		12.00	9.60	19.20	16.80	42.00	34.00
St. Louis and Denver and Colorado Springs		6.75	5.40	10.80	9.45	24.00	
St. Louis and El Paso		9.00	7.20	14.40	12.60	32.00	26.00
St. Louis and Hutchinson		4.00	3.20	6.40	5.00	14.00	11.00
St. Louis and Kansas City	1.00	2.00	2.00	4.00	3.00	9.00	7.00
St. Louis and McFarland		2.00	2.00	4.00	3.00	11.00	9.00
St. Louis and Phoenix		12.50	10.00	20.00	17.50	44.00	35.00
St. Louis and Sacramento, San Francisco, Los Angeles and San Diego		15.00	12.00	24.00	21.00	53.00	42.00
St. Louis and Palm Springs		14.50	11.60	23.20	20.00	51.00	41.00
St. Louis and Topeka		2.75	2.20	4.40	3.00	10.00	8.00
St. Louis and Tucson		11.50	9.20	18.40	16.10	41.00	32.00
St. Louis and Wichita		2.75	2.20	4.00	3.00	14.00	
Wichita and Ft. Worth and Dallas		5.00	4.00	8.00	6.25	18.00	
Wichita and Rock Island and Davenport		4.25	3.40	6.80	5.95	15.00	
Wichita and Houston		5.00	4.00	8.00	7.00		

TOURIST CAR

BETWEEN	Lower Berth	Upper Berth	Sect'n one Pass. only
Chicago and El Paso	$5.25	$4.20	$7.35
Chicago and Kansas City	1.50	1.20	2.10
Chicago and Los Angeles	7.50	6.00	11.00
Chicago and Topeka and McFarland	1.50	1.20	2.10
Chicago and Tucson	5.25	4.20	7.35
Chicago and Phoenix	7.50	6.00	10.50
Chicago and Yuma	7.50	6.00	10.50
El Paso and Rock Island and Davenport	5.00	4.00	7.00
Excelsior Springs and Chicago	3.00	2.40	4.20
Excelsior Springs and El Paso	5.00	4.00	7.00
Excelsior Springs and Los Angeles	7.50	6.00	10.50
Hutchinson and Chicago	3.00	2.40	4.20
Kansas City and Chandler	5.25	4.20	7.35
Kansas City and Davenport and Rock Island	1.50	1.20	2.10
Kansas City and El Paso	5.00	4.00	7.00
Kansas City and Los Angeles	7.50	6.00	10.50
Kansas City and Phoenix	5.25	4.20	7.35
Kansas City and Tucson	5.25	4.20	7.35
Los Angeles to Columbus Junction	7.50	6.00	10.50
Los Angeles to Muscatine, Davenport and Rock Island	7.50	6.00	10.50
Los Angeles to Topeka	5.25	4.20	7.35
Santa Rosa and Chicago	5.25	4.20	7.35
Santa Rosa and Topeka	3.75	3.00	5.25

*Fare in Rock Island Parlor Car $1.50.

● Single Bedroom between Chicago and Omaha $5.40. Chicago and Des Moines $4.50.

A drawing-room is a private room with an upper and lower berth and a sofa (which can be converted into a lower berth), with private toilet room adjoining. A compartment is a private room with an upper and lower berth, and toilet facilities in the same room. A section is a lower and upper berth with only the lower made down for occupancy. The purchaser of a drawing-room, compartment, or berth, either upper or lower, has exclusive right to its occupancy. It is necessary, however, when drawing-room is occupied by a single individual, to present one and one-fourth railway tickets. When compartment is occupied by a single individual one full fare and one-tenth railway ticket are required. Only one adult railway ticket is required for exclusive occupancy of a section.

NOTE 1—Fares shown in this column are charged when two persons occupy the section with only the lower berth made down.

NOTE 2—Fares shown apply when compartment or drawing-room is occupied by two or more persons. For single occupancy the charge for a compartment will be two times the charge for a lower berth, and for a drawing-room the charge will be approximately two and one-half times the charge for a lower berth.

When compartments and drawing-rooms are desired for day service, minimum requirements for rail tickets are two adult railway tickets for a drawing-room, and one and one-half railway tickets for a compartment. Minimum charge for space will be on the basis of three seat fares for a drawing-room in Parlor Cars and four seat fares for Drawing Room in Sleeping Cars and three seat fares for compartment.

General Information (Continued)

HONORING ARRANGEMENTS VIA C. R. I. & P. RY.

One-way and round trip Interline tickets, good for passage between Chicago, Kansas City and beyond will be honored via direct line through Washington, Iowa, or via Des Moines, Iowa. This arrangement also applies on one-way and round trip tickets of C. R. I. & P. issue good for passage via C. R. I. & P. from Chicago, Ill., to Lawrence, Kan., and points beyond (or the reverse).

Round trip tickets good for passage between Chicago, St. Louis, Kansas City, St. Joseph, Omaha and stations east and Tucumcari, N. M., and points beyond will be honored via Texhoma or Texola, Okla., or Oklahoma City and Texola, Okla.

Tickets good for passage between Chicago or Peoria and Denver or Colorado Springs and beyond, will be honored via Council Bluffs, Omaha, St. Joseph or Kansas City. (Applies only on tickets to or from points in California (not via Portland or Seattle), Colorado, Nevada, New Mexico, Utah or Wyoming.)

Tickets from and via Kansas City or St. Joseph, Mo., or Omaha, Neb., also from Topeka, Kan., to El Paso, Texas, and destinations beyond, good for transportation via Texhoma, Okla., and Santa Rosa, N. M., will, if desired, be honored to Wichita, Kan., and from Hutchinson, Kan. On application to C. R. I. & P. Agent at Wichita, passenger will be furnished ticket reading via A. V. I. from Wichita to Hutchinson without extra charge. The same arrangement will apply in the reverse direction, i. e., tickets will be honored to Hutchinson and from Wichita, and on application to C. R. I. & P. Agent at Hutchinson, ticket reading via A. V. I. from Hutchinson to Wichita will be furnished without extra charge.

Round trip tickets good for passage between Chicago, St. Louis, Kansas City, St. Joseph, Omaha or stations east and Fort Worth or Amarillo and points beyond will be honored via Oklahoma City if desired.

Round trip tickets to points in Arizona, California or Oregon routed from or through Kansas City or St. Joseph, Mo., or Omaha, Neb., via C. R. I. & P. Ry. and Santa Rosa, N. M., will be honored from Herington to Wichita, Kan., and return, without additional charge.

Round trip tickets from points in Arizona, California or Oregon to Kansas City or St. Joseph, Mo., or Omaha, Neb., or to a point beyond routed via Santa Rosa, N. M., and C. R. I. & P. Ry. to or via Kansas City or St. Joseph, Mo., or Omaha, Neb., will be honored from Herington to Wichita, Kan., and return, without additional charge.

Numerous other optional, diverse and honoring arrangements are also available.

210A

BLANK PAGE

[fol. 442] EXHIBIT 5

ARKANSAS SEPARATE COACH LAW

(Digest of Statutes of Arkansas, Crawford & Moses (1921) Sections 986-997)

Sec. 986.

Equality of accomodations. All railway companies carrying passengers in this State shall provide equal but separate and sufficient accommodations for the white and African races by providing two or more passenger coaches for each passenger train; provided, each railway company carrying passengers in this State may carry one partitioned car, one end of which may be used by white passengers and the other end by passengers of the African race, said partition to be made of wood, and they shall also provide separate waiting rooms of equal and sufficient accommodations for the two races at all their passenger depots in this State.

Sec. 987.

Exception as to street cars. The foregoing section shall not apply to street railroads. In the event of the disabling of a passenger coach, or coaches, by accident or otherwise, said company shall be relieved from the operation of this act until its train reaches a point at which it has additional coaches.

Sec. 988.

Passengers to occupy places assigned. No person or persons shall be permitted to occupy seats in coaches or waiting rooms other than the ones assigned to them on account of the race to which they belong; provided, officers in charge of prisoners of different races may be assigned with their prisoners to coaches where they will least interfere with the comfort of other passengers; provided, further, that section 986 shall not apply to employees of a train in the discharge of their duties, nor shall it be construed to apply to such freight trains as carry passengers.

Sec. 989.

Separate sleeping and chair cars. Carriers may haul sleeping or chair cars for the exclusive use of either the white or African race separately, but not jointly.

[fol. 443] Sec. 990.

Short lines. On all lines of railway less than thirty miles long, passenger coaches may be divided by partition.

—991.

Duty of officers. The officers of such passenger trains and the agents at such depots shall have power, and are required to assign each passenger or person to the coach or compartment or room used for the race to which such passenger or person belongs.

Sec. 992.

Penalty. Any passenger or person insisting on going into a coach or compartment or room to which by race he does not belong shall be liable to a fine of not less than ten dollars nor more than two hundred dollars, and any officer of any railroad company assigning a passenger or person to a coach or compartment or room other than the one set aside for the race to which said passenger or person belongs shall be liable to a fine of twenty-five dollars.

Sec. 993.

Duty of passenger. Should any passenger refuse to occupy the coach or compartment or room to which he or she is assigned by the officer of such railway company, said officer shall have the power to refuse to carry such passenger on his train, and should any passenger, or any other person not passenger, for the purpose of occupying or waiting in such sitting or waiting-room not assigned to his or her race, enter said room, said agent shall have the power, and it is made his duty, to eject such person from such room, and for such acts neither they nor the railway company which they represent, shall be liable for damages in any of the courts of this State.

Sec. 994.

Railroad's noncompliance—penalty. All railway companies that shall refuse or neglect to comply with the provisions and requirements of this act shall be deemed guilty of a misdemeanor, and shall upon conviction before any court of competent jurisdiction, be fined not less than one hundred dollars nor more than five hundred dollars, and

every day that such railway company shall fail to comply with the provisions of this Act and every train run in violation of the provisions hereof, shall be a separate offense; and any conductor or other employees of such passenger train having charge of the same or any agent at such depot who shall refuse or neglect to carry out the provisions of this act shall, on conviction be fined not less than twenty- [fol. 444] five dollars nor more than fifty dollars for each offense.

Sec. 995.

Posting law. All railroad corporations carrying passengers in this State, other than street railroads, shall keep this law posted up in a conspicuous place in each passenger coach and waiting room.

Sec. 996.

Races defined. Persons in whom there is a visible and distinct admixture of African blood shall, for the purposes of this act, be deemed to belong to the African race; all others shall be deemed to belong to the white race.

Sec. 997.

Freight trains. The railroad companies shall not be required to furnish separate coaches in freight trains for the white and African races.

[fols. 445-453] Report proposed by Wm. A. Disque, examiner omitted. Printed side page 16, ante.

[fols. 454-463] Report of Commission Omitted. Printed side page 26 ante.

[fol. 464] Order of Commission Omitted. Printed side page 44 ante.

[fol. 465] Order denying petition for rehearing etc. Omitted. Printed side page 45 ante.

[fol. 465½] And on, to wit, the 27th day of May, A. D. 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Exhibit No. 1, in words and figures following, to wit:

[fols. 466-467] DEFENDANTS' EXHIBIT 1

Interstate Commerce Commission,

Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of Reply of Frank O. Lowden, et al., Trustees, filed June 4, 1938, in Docket No. 27844, Arthur W. Mitchell v. Chicago, Rock Island & Pacific Railway Company Trustees et al., the original of which is now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 20th day of May, A. D. 1940.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 468] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 27844

ARTHUR W. MITCHELL, Complainant,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island & Pacific Railway Company, a Corporation; Illinois Central Railway Company, a Corporation; and Pullman Company, a Corporation, Defendants

REPLY OF FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, TO COMPLAINANT'S EXCEPTIONS—Filed June 4, 1938

Complainant's Exception I, which excepts to the Examiner's failure to sustain a motion to strike the answer of The Chicago, Rock Island and Pacific Railway Company, is of no importance. Defendants deny that their answer failed to comply with Rule IV (e). The rule is so worded as to make it impossible to "state fully the grounds relied upon," except in the form of an explanation of a preliminary

admission of allegations in the complaint. Defendants made no such admission, but denied the allegations. Such denial is a statement in full of the grounds relied upon. Were there merit to the complainant's contention and the answer were stricken, the result would be a nullity. With no answer on file, the issue would still be joined (Rule IV [fol. 469] (b)) and the case would proceed. See Vol. 3, Interstate Commerce Acts Annotated, p. 1774.

In Exception II, complainant objects to the Examiner's finding that complainant accepts segregation under the Arkansas Statute, and he declares that the record fails to show that complainant has accepted segregation. The Examiner is correct in his finding and he is supported by the record. He could make no other finding in view of the explicit statement (p. 143) by the complainant himself that "the question of segregation is not involved," and the succeeding colloquy between the Examiner and complainant. The finding is further supported by the introduction in evidence by complainant of the Arkansas Statute requiring segregation of races.

The Examiner's statement, which is made the subject of Exception III, is also supported by the colloquy, above referred to, beginning on page 143.

Complainant's Exception IV is a mere quibble over words and requires no elaboration.

Complainant's Exceptions V, VI, VII and VIII are so related that they may be appropriately considered together. Much of complainant's discussion is a reiteration of testimony and argument presented in his initial brief, and it was fully analyzed and considered in the brief of these defendants. There is here no intention to reprint or to review the details and arguments contained in that brief. They were before the Examiner when he studied the case and reached his conclusion, and they are still before the Commission [fol. 470] for its attention. In a number of instances complainant, in his exceptions, refers to "undisputed testimony". The record and defendants' brief will disclose that much of the so-called undisputed testimony met, in fact, substantial rebuttal.

In his exceptions complainant appears to place great emphasis upon McCabe vs. A. T. & S. F. Ry. Co., 235 U. S. 151. That case did not arise under the Interstate Commerce Act. Nor did it involve any question of undue discrimination, as defined by the Act and various decisions of

this Commission and of the courts. It did not touch upon the exercise by this Commission of the powers defined and limited by that statute. The McCabe Case originated in an effort by a group in Oklahoma to enjoin in court, before it became effective, the enforcement of a segregation act passed by the legislature of Oklahoma. The question presented was strictly judicial, and the attack was upon a state statute as being, among other things, repugnant to the 14th Amendment. The lower courts denied the injunction, and the Supreme Court of the United States affirmed that denial. The language from that opinion, cited by complainant, was mere obiter. It related wholly to a discussion of an abstract idea advanced in that particular case and, as the conclusion of the opinion showed, had nothing to do with the determination of the case. Four Justices signified their concurrence in the result only.

That the Court did not itself regard the language as [fol. 471] conclusive is proved by a later case. In South Covington, etc., Railway Company vs. Kentucky, 252 U. S. 399, decided April 19, 1920, the court held that the segregation statute of Kentucky was enforceable against an interurban line with an interstate service across the Ohio River, between Kentucky and Ohio. Justices Day, Van Devanter and Pitney dissented. In their dissent (p. 406) occurs this language:

"How could this separate car or compartment statute be complied with? It is first suggested a separate car could be put on for the accommodation of colored passengers for the distance of the intrastate run on the Kentucky side of the river. *In view of the nature of the transportation and the meager patronage compared with the expense of such an undertaking, this method would be impracticable without interrupting travel and entailing a great loss upon the company.*"

The Justices who thus gave weight to the meager patronage and expense to the company were, six years before, three of the five Justices responsible for the majority opinion in the McCabe Case. It is clear that within the court itself the utterance quoted by complainant was not regarded as an authoritative statement of law.

That it cannot be so regarded is further supported by the decision of the Supreme Court in Chiles vs. C. & O. R. R.

Co., 218 U. S. 71, discussed in the defendants' initial brief. Although the case is earlier, it is directly pertinent. In that case the Supreme Court sustained the action of the railroad in transferring a colored passenger from a white coach into a colored compartment coach. The coaches were not iden- [fol. 472] tical, but the court found them substantially equal in quality, convenience and accommodation. It is obvious that the car, divided by board partitions into three compartments, was assigned to colored passengers because the volume of colored travel did not justify the assignment of an entire coach. The arrangement met the tests of law.

But whether the comments of the Supreme Court in the McCabe Case, as quoted in complainant's exceptions, are regarded as obiter dicta or are accepted as conclusive law, they do not justify the satisfaction which the complainant appears to derive from them. The Oklahoma statute, which complainants in that case sought to enjoin, provided that nothing contained in that Act should be construed to prevent railway companies "from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or colored passengers, separately but not jointly." Bear in mind that the subject matter was a state statute. The Attorney General of Oklahoma, in the brief filed by him in support of the law, urged that "the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or, sufficient profit to justify the furnishing of the facility." It was contended (p. 161) that the meaning of the clause was that that the carriers might provide sleeping cars, dining cars and chair cars exclusively for white persons and provide [fol. 473] no similar accommodations whatsoever for negroes. It was this argument which the court described as being without merit. "Whether or not particular facilities shall be provided," said the court, "may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, *substantial equality* of treatment of persons traveling under like conditions cannot be refused."

It is to be noted that the contention urged was that under that statute the carriers were not required to provide for colored passengers any of the described accommodations, if the travel did not afford the carriers the same profits per car as were afforded by white occupancy. But, in its com-

ment, it should be emphasized that, while rejecting the Attorney General's argument, the opinion recognized that substantial equality of treatment, not identical, was sufficient under the State statute. The furnishing of particular facilities was regarded by the opinion as being properly conditioned upon a reasonable demand therefor. It necessarily follows that the volume, or capacity, of the facilities furnished may properly be controlled by, or adapted to, that demand. Certainly, if these defendants have provided substantial equality of accommodations, of sufficient capacity to meet the reasonable demand therefor, neither the argument of the Attorney General of Oklahoma nor the comment of the Supreme Court on it can be tortured into a discussion or judgment of the present proceeding.

[fol. 474] If this case presents a constitutional question (which defendants deny), such a question is for judicial determination. The 14th Amendment lays its impositions upon State governments. Its interpretation does not belong to a regulatory body exercising authority under standards and practices prescribed by a Federal statute. It is for the Commission to determine whether, under the Interstate Commerce Act, complainant has been subjected to an undue prejudice.

The evidence, which need not be elaborated, shows that on the day complainant applied for a seat in a pullman car space ordinarily used for such an accommodation had been sold.

It is the evidence that the assignment of a drawing-room or a compartment in a pullman car is sufficient to accommodate the occasional and meager demand for such service by colored passengers. One of complainant's own witnesses (p. 68) testified that he had ridden in pullman cars in Arkansas. Others had never sought such accommodations.

There is no law requiring identical accommodations, either for white passengers as among themselves, or for white and colored passengers, considered separately. White passengers are given varied services. In some instances they ride on "mixed" trains, carrying freight. In others, cabooses or freight trains afford their only accommodations. Some trains carry diners; others, over the same routes, stop for meals at station eating-houses. There are trains of solid pullmans, others with none. In some trains are lounge and buffet cars, but not in others. Speeds differ widely. [fol. 475] No racial factor is involved. Volume and de-

mand determine such services. Defendants know of no contention that such varied treatment constitutes unlawful discrimination or a denial of equal protection. In providing pullman accommodations for colored travel, defendants have provided accommodations equal to any other luxury accommodations, whether they are called parlor cars or are given some other name. In doing so they have complied with every obligation laid upon them.

The evidence establishes that coach accommodations provided for colored passengers are substantially equal to those for white passengers, and they are sufficient. Therefore, no allegation of undue prejudice can be properly sustained.

It is obvious from the exceptions that complainant is persisting in an effort to manufacture an issue where none exists, and to magnify the experience of a single individual on a given day into a national spectacle. The Commission, of course, is concerned only with the merits of the case presented to it.

The recommendation by the Examiner that the complaint be dismissed is sound. The record will support no other conclusion.

Daniel Taylor, Wallace T. Hughes, Attorneys for Defendants, Frank O. Lowden, James E. Gorman, Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company.

Chicago, Ill.
June 3, 1938.

[fols. 476-477] Certificate of Service

I hereby certify that I have this day served a copy of the foregoing upon all parties of record, by mailing a copy thereof to each party, properly addressed.

Dated at Chicago, Ill., this 3rd day of June, 1938.

Wallace T. Hughes, Of Counsel for Defendants.

[fol. 478] [File endorsement omitted]

[fol. 479] IN UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION AT CHICAGO

In Equity. No. 500

ARTHUR W. MITCHELL, Complainant,

vs.

UNITED STATES OF AMERICA, FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation; and Pullman Company, a corporation, Defendants.

Statement of Evidence—Filed November 14, 1940

Report of proceedings had and evidence taken at the hearing of the above-entitled cause before the Honorable William M. Sparks, one of the Judges of the United States Circuit Court of Appeals, sitting as a Judge of said District Court, and the Honorable Charles E. Woodward and Michael L. Igoe, Judges of said District Court, sitting in banc, on Monday, May 27, A. D. 1940.

[fol. 480] Present:

Mr. Richard E. Westbrooks, and Mr. Arthur W. Mitchell, Pro Se, appeared on behalf of plaintiff;

Mr. J. Stanley Payne, Senior Assistant Chief Counsel of the Interstate Commerce Commission, appeared on behalf of the Interstate Commerce Commission;

Mr. Wallace T. Hughes, and Mr. Daniel Taylor, appeared on behalf of Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation, defendants;

Messrs. Elmer A. Smith, Herbert J. Deany and Robert Mitten, by Mr. Robert Mitten, appeared on behalf of Illinois Central Railway Company, a corporation, defendant;

Mr. L. M. Greenlaw, Mr. C. S. Williston, and Mr. Erwin W. Roemer, appeared on behalf of Pullman Company, a corporation, defendant.

The Court: (Judge Sparks): Is this the case of Mitchell vs. United States, gentlemen?

Mr. Westbrooks: Yes, may it please the Court.

The Court (Judge Sparks): What is pending here?

Mr. Westbrooks: This is a review of an order of the [fol. 481] Interstate Commerce Commission, in which a petition was filed before that body complaining of discrimination.

In April, 1937, Congressman Mitchell bought a round-trip ticket between Chicago——

The Court (Judge Sparks): Tell me what is before the Court.

Mr. Westbrooks: A petition to review that final order.

The Court (Judge Sparks): Are you introducing evidence?

Mr. Westbrooks: Yes, I shall.

THEREUPON THE PLAINTIFF, TO MAINTAIN THE ISSUES ON HIS BEHALF, INTRODUCED THE FOLLOWING EVIDENCE, TO WIT:

Mr. Westbrooks: I want to introduce a certified copy of the proceedings before the Interstate Commerce Commission.

The Court (Judge Sparks): Is there any objection to that, gentlemen?

Mr. Payne: None, except, your Honors, that included amongst the papers here are the petition to the Interstate [fol. 482] Commerce Commission, the transcript of the testimony and a few exhibits, the Examiner's proposed report, but not the exceptions.

Therefore, I wish to introduce the exceptions to the Examiner's report, a certified copy of those exceptions.

The Court (Judge Sparks): I believe you are a little out of order. As I understand it, the plaintiff is now introducing his evidence.

Mr. Westbrocks: Yes.

The Court (Judge Sparks): Plaintiff's Exhibit 1 will be received in evidence.

(Which said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1 and is returned herewith and made a part hereof.)

Mr. Payne: I will offer these in evidence later.

The Court (Judge Sparks): Yes.

Mr. Westbrooks: That is all the evidence we have to produce.

The Court (Judge Sparks): All right.

[fol. 483] THEREUPON THE DEFENDANTS, TO MAINTAIN THE ISSUES ON THEIR BEHALF, INTRODUCED THE FOLLOWING EVIDENCE, TO WIT:

Mr. Payne: Your Honors, I wish to introduce the exceptions of Arthur W. Mitchell to the Examiner's proposed report and the reply of defendants to those exceptions.

The Court (Judge Sparks): They may be admitted in evidence.

(Which said documents, so offered and received in evidence, were marked, respectively, Defendants' Exhibits 1 and 2, and are returned herewith and made a part hereof.)

The Court (Judge Sparks): Very well.

Are you ready for argument?

Mr. Mitchell: Yes.

I am Arthur W. Mitchell.

The Court (Judge Sparks): You are the plaintiff here?

Mr. Mitchell: I am the plaintiff and also an attorney of record.

I wish to begin, if the Court please, by reviewing briefly was has happened in the case. The offense complained of [fol. 484] here was committed by the defendants on April 21, 1937. The Complaint was filed before the Interstate Commerce Commission on September 2, 1937. On December 4, 1937, the Complaint was assigned for hearing by the Commission and all the parties were duly notified. Said hearing was set for March 7, 1938, and was held in the City of Chicago, Illinois, the Commission being represented at the hearing by Examiner W. A. Disque.

On May 5, 1938, Examiner Disque submitted his report to the Commission and recommended that the Complaint be dismissed. On May 24, 1938, complainant before the Commission filed exceptions to the report and recommendations of the Examiner and requested oral arguments before the

full Commission. Oral arguments were heard in Washington on July 6, 1938, before the full Commission, and on November 7, 1938, decision was handed down by the Commission.

On January 21, 1939, a petition was filed with the Commission praying for a re-hearing before that body. On March 6, 1939, the Commission handed down an order denying a re-hearing before the Commission.

On April 20, 1939, suit was filed in the United States [fol. 485] District Court, and that is the suit we are now proceeding with.

The Court: (Judge Woodward): What was the Complaint originally?

Mr. Mitchell: The Complaint consisted of these facts: That on April 21, 1937, while plaintiff was a passenger traveling on a first-class ticket which had been bought here at the Illinois Central Railway Company entitling plaintiff to first-class passage from Chicago to Hot Springs, Arkansas, he was traveling in a Pullman car on accommodations which he had paid for here, as far as within a few miles of Memphis, Tennessee; that before reaching Memphis, Tennessee, plaintiff was informed that the Pullman car in which he was riding would not go to Hot Springs but that there was a car attached to that train which would go to Hot Springs, and that there were ample accommodations in that car to take care of plaintiff.

Plaintiff accordingly sent for the Pullman porter of this particular car which was going to Hot Springs and arranged with this Pullman porter, in charge of this car (as there was no Pullman conductor going over that line) to [fol. 486] take plaintiff and assign space in this car to plaintiff, which was done, on the morning of April 21, 1937, several miles before the train arrived at Memphis, Tennessee.

After the train reached Memphis, Tennessee, and this particular car which was going to Hot Springs was switched around and taken over by Rock Island passenger train No. 45, the plaintiff, who had been in this car and had traveled several miles into the State of Arkansas, from Memphis, Tennessee, proceeded on his journey to Hot Springs in that direction.

But when the conductor came around to take up the fares he noted that plaintiff was a colored man and he explained that the plaintiff could not ride in a Pullman car in the State of Arkansas notwithstanding the fact that plaintiff

had purchased first-class passage and had already arranged with the Pullman porter in charge of that car for space and was traveling in that space.

Following objection by plaintiff to the conductor, the plaintiff was ejected from the car and was forced to ride to Hot Springs in a second-class car.

The original petition before the Interstate Commerce [fol. 487] Commission prayed that the Rock Island Railway be compelled to comply with the laws of the State of Arkansas which provide that races traveling in that state must be separated, but with equal accommodations.

We alleged that while the accommodations are separate they are in no wise equal; in other words, that a negro traveling as a passenger on the Rock Island Railway in the State of Arkansas has no opportunity to enjoy first-class accommodations notwithstanding the fact that he might be in possession of his first-class ticket, that there is gross discrimination because of race, and that is the essence of this suit.

Now, the uncontroverted facts in this case are these:

On the 20th of April, 1937, plaintiff purchased a railroad ticket at the Illinois Central Railway Station in Chicago which entitled him to travel first class from Chicago, Illinois, to Hot Springs by way of Memphis, Tennessee, over the Illinois Central Railway from Chicago to Memphis, Tennessee, and over the Rock Island Railway from Memphis, [fol. 488] Tennessee, to Hot Springs, Arkansas; and that plaintiff paid the agent of the Illinois Central Railway Company in the City of Chicago the sum of $27.50 for this transportation, which was a first-class fare for the round-trip between Chicago and Hot Springs.

On April 20, 1937, plaintiff boarded an Illinois Central train known as passenger train No. 3 which left Chicago for Memphis, Tennessee, and other points south at 6:05 o'clock p. m., and used the railroad ticket I have referred to and arrived in Memphis, Tennessee, early the following morning, April 21, 1937.

It is further contended, and it has not been disputed, that plaintiff traveled on said train from Chicago to within a few miles of Memphis, Tennessee, occupying a compartment in a Pullman car for which plaintiff had paid an additional sum of $9.15.

It is also uncontroverted that on the morning of April 21,

and before the train on which plaintiff was traveling reached Memphis, Tennessee, the plaintiff arranged with the Pullman porter who was in charge of a Pullman car going direct from Chicago to Hot Springs for space in the Hot Springs car, and plaintiff with his baggage was transferred from [fol. 489] the car in which he had traveled from Chicago to the Pullman car which was bound for Hot Springs, and that plaintiff proceeded to Memphis, Tennessee, in the Pullman car to which he had been transferred and to which he had been assigned by the Pullman porter in charge.

The plaintiff continued on his journey to Hot Springs, Arkansas, traveling in this Pullman car until he had gone several miles from Memphis, Tennessee, into the State of Arkansas, traveling from Memphis over the Rock Island Railway.

The train conductor in charge of Rock Island passenger train No. 45 running between Memphis, Tennessee, and Hot Springs, Arkansas, on April 21, 1937, refused to allow the plaintiff to continue his journey to Hot Springs in the Pullman car in which he was then riding, but ejected plaintiff from the Pullman car and compelled him to complete his journey to Hot Springs traveling in the Jim Crow car which did not have the furnishings and the equipment of the Pullman car from which plaintiff had been ejected, and the accommodations were in no wise equal.

That passenger train No. 45, to which the Pullman car was attached in Memphis, Tennessee, and carried over the [fol. 490] Rock Island Railway to Hot Springs on April 21, 1937, was in charge of Conductor Albert W. Jones of 711 East Sixth Street, Little Rock, Arkansas, and it was Conductor Albert W. Jones who ejected plaintiff from the Pullman car in which he was traveling.

At the hearing before Examiner Disque there appeared a large number of witnesses, but the main witness for the defendants was Conductor Albert W. Jones, the gentleman to whom I have already referred, and it appears that the Interstate Commerce Commission, in reaching its decision, had full consideration of the evidence which was submitted by Mr. Jones, and that is without doubt the evidence on which all of the defendants have relied to sustain their contention in this case.

I first want to call your Honor's attention to the fact that there is no question about the plaintiff having been ejected

from the Pullman car by Conductor Jones, and it is our contention that he was ejected solely because of race. In that connection I wish to refer to the evidence taken before the Examiner, found on pages 154, 168 and 169, which evidence I will read.

The Court (Judge Sparks): If you have the evidence [fol. 491] here do not read too much. It will occupy too much time. We have the record and we will read it.

Mr. Mitchell: I thank the Court.

In the evidence I have referred to it is made plain by the witness already referred to, Mr. Jones, that there was no reason in the world why the plaintiff was ejected from this car except that he was a colored man.

The Court (Judge Sparks): They do not contend anything different, do they?

Mr. Mitchell: They do not.

He admitted that the car in which the plaintiff was forced to ride was an inferior car without first-class accommodations. He admitted that in the evidence.

He stated further, and I want to argue this, that he had been a conductor on that road for thirty-two years and during that time he had never sold space to a colored man to ride first class. In fact he admitted further, and the Court will have it before it in the evidence which has been filed, that during his thirty-two years on the Rock Island Railway that road had never had first-class accommodations for colored people.

[fol. 492] The defendant Rock Island Railway attempted to make much of the fact that the bulk of the travel of negroes over that line in that state is not sufficient to justify the contention that negroes should have these accommodations. To sustain that position Mr. Jones testified he had been a conductor for thirty-two years and he had had perhaps one application each year from some colored man who wanted first-class accommodations, but that he denied them. Defendants attempt to use that as proof that the bulk of the travel of negroes, or that the number of colored passengers seeking first-class accommodations in that state is so small as not to be justified, but you can understand that if it is their custom to deny these accommodations to colored people, and he admits it is the custom, then these were pretty bold people who would go to him, after knowing the custom, and ask for these accommodations. There is no proof that these were the only people that wanted these

accommodations, but he admitted he does not know how many people applied at the window in Little Rock, Arkansas, and Hot Springs, Arkansas, for these accommodations that were denied these accommodations.

[fol. 493] He also admits he does not know how many negroes wishing to travel first class applied for such accommodations at Memphis, Tennessee, over this line and were denied them.

Those of us who travel know it is impossible for a conductor on a passenger train to know who applies for that train and who do not, and we seriously challenge the statement that a sufficient number do not apply. In fact, we submit that the constitutional rights of individuals to have and enjoy these same privileges do not depend upon the number of people who apply for them.

The Supreme Court of the United States has said on more than one occasion that the constitutional rights of individuals are individual and personal, and they are not to be considered in bulk. They said that in a decision in 1916 handed down, I believe, by our present Chief Justice Hughes, and as late as 1939 this rule was repeated in the case of Gaines vs. Canada, et al., by the same Justice.

In 1916 Mr. Justice Hughes was an associate Justice. He is now our Chief Justice and he quoted those same words.

It is our contention that this is rank discrimination [fol. 494] because of race.

The Court (Judge Sparks:) What relief did you ask of the Commission?

Mr. Mitchell: We asked a rule that the railroad be compelled to desist from its practice and to give these things to the colored people that the law of the State of Arkansas provides they shall have.

I wish the Court would remember that they enforce rigidly that part of the law which provides that they must travel separately. As a group who have to suffer the inconveniences of such a law, we contend that if you are going to "Jim Crow" us and put us off, then we are entitled to the benefits of the law that we at least ought to have equal accommodations. There is no question of segregation involved. We have not said to the railroad that it must let us ride together with the white people. I care as little about riding with white people as they care about riding with me, but if I buy first-class passage to ride on the Rock Island or on any other railroad in the United States, under my

constitutional rights I am entitled to the same treatment as any man is entitled to regardless of color.

[fol. 495] The Court (Judge Woodward): What are the provisions of the statute?

Mr. Mitchell: What I have recited, that they must travel separately, but that accommodations must be equal.

The Court (Judge Woodward): Are you invoking the Arkansas statute?

Mr. Mitchell: I am saying that I was traveling in interstate commerce as a passenger, and that the railroad had no right to descriminate against me because I went into that state. I also stated to the Commission that the State of Arkansas was violating its own law. They have a law there providing for equal accommodations for negro passengers but they violated that law and they are violating that law. I asked the Commission to enforce that law but they refused to do so.

I wish to call to the attention of this Court the fact that the decision denying us that relief for which we prayed was a six-five decision of the Commission, and I also wish to call this Court's attention to a remark made in the dissenting opinion of Commissioner Eastman. I might say that there were three dissenting opinions. One of them was agreed [fol. 496] to by three members of the Commission and the other two dissenting Commissioners rendered their own decisions.

On page 15 of the decision, Commissioner Eastman, in handing down his dissenting opinion, said this, and this was the opinion of three of the judges:

"* * * The facts are that white passengers were and are given adequate opportunity to obtain seats, berths, compartments, or rooms in Pullman cars, together with the right to use any dining car or observation car that may be attached to the train, whereas colored passengers have no opportunity to obtain seats or berths in the body of the car or to use dining or observation cars, but may obtain accommodations in a compartment or room, provided one can be found that has not previously been taken by a white passenger. * * *"

Then he makes this significant statement and I think it is a shame such a statement has to be made and was made by Commissioner Eastman, but it is true and was agreed to by the other Commissioners:

"* * * If the conditions were reversed, I cannot believe that the white passengers would regard this as equal-
[fol. 497] ity of treatment and opportunity."

Now, I am in the Congress of the United States, working with the men who make the laws of this country, and I have been there for the last six years. I know the tendency in this country is to deny negroes their rights. I do not believe there is a well thinking white man in the United States to deny when a negro comes to bat, whether it is in the economic world seeking an opportunity to make a living, or wherever it is, he comes to bat with two strikes against him.

We feel that if we are going to maintain this democracy we say so much about, both in Congress and out of Congress, we have come to a court of justice, our last resort, when our rights are taken from us and trampled upon by the strong of this nation.

After having been denied these rights by the Commission that had all the facts before it and could possibly offer no excuse worth listening to except that the controversy involved a negro, we have now come to a court of justice that is supposed to be blind to color and that looks only at the rights of the individuals. That is why we are here.

[fol. 498] I have come to this court at great expense. I come here because I still have confidence in the laws of this country and in those who administer them. I know it takes a courageous white man to stand up where the controversy is between a negro and a white man and say to the negro: "These are your rights and I will stand by you."

As I say, I am with the law makers of this country and I talk to them confidentially, and I agree with Clarence Darrow, that it is a most difficult thing to find a white man that does not start out with some prejudice.

I wish to call attention to the fact that Conductor Jones in his testimony before the Commission, stated that he told me that it did not make any difference about my being a member of the Congress of the United States, that I would have to take the same treatment that all other negroes take in the State of Arkansas. He didn't use just those words but that is just exactly what he meant.

I want to close my appeal to this Court by saying we have brought you all the facts. We are not asking for any
[fol. 499] mercy; we are asking for justice. We have no fancier appeal to make.

There are at this moment fifteen millions of American citizens with their ears and their eyes turned toward this Court believing in their hearts that we have already been seriously wronged by a body set up by our Government, the Interstate Commerce Commission, but believing, as I believe, that in the courts the facts will not be ignored. We bring you no new facts. We bring you the truth, the admitted truth, and all we are asking is that the color of the litigants be forgotten, that the facts be considered and that we keep in mind the fact that, while democracy is trembling and shaking the world over, we believe that that condition has been brought about by a disregard for the rights of people.

Our little group here number fifteen millions of the most loyal people we have in America today, a group that has never raised its hand against our Government and does not intend to do so.

I stood on the floor of the House the other day and condemned the Communistic followers. I said to the Congress of the United States that the negroes in this country take [fol. 500] their medicine whether it is bitter or sweet, and we are loyal.

I said further that we have gone with you through all your battles and we have given you our blood and our lives. We ask you to treat us as citizens and do not push us around when our rights are being trampled upon ruthlessly. Give us the same consideration that you give the Chinaman, the Filipino, the Jew or anybody else. We ask no more; we are entitled to no less.

The Court (Judge Igoe): What is the Arkansas statute?

Mr. Mitchell: That will be recited by Mr. Westbrooks, who will argue the law in this case.

Mr. Westbrooks: May it please your Honors: It is indeed quite embarrassing at this late day and age for an American citizen to be compelled to appeal to courts to get simple justice, that which has been decreed by the courts of the United States, the enforcement acts, the 14th Amendment, the Acts of Congress and the Laws of the United States made pursuant to that constitution. But we find ourselves bringing before this Court a fact that is undisputable; that is, that Mitchell in this case was discriminated against [fol. 501] merely on account of his color.

In my petition I set out the evidence of Mr. Jones; that is, a part of the evidence of Mr. Jones. The full evidence

is set out in the transcript there. But Mr. Jones stated that that was the only reason he did not recognize Congressman Mitchell's ticket. The Congressman stated he had a first-class, round-trip ticket to Hot Springs which entitled him to the same first-class accommodations as every other citizen who paid a first-class fare under similar circumstances.

I hardly think it is necessary to state our claim in this case is based upon the sections of the Commerce Act which, in the creation of the Commerce Commission, your Honor will recall, followed the old Commerce Court. That Act provided that the Interstate Commerce Commission shall have control of the transportation of passengers and property wholly by railroad or partially by railroad. That may be found in Title 14 of the U. S. C. A. It is also provided that just and reasonable charges are required.

Section 5 of Title 49 holds that all charges made for any [fol. 502] services rendered or to be rendered in the transportation of passengers or property shall be just and reasonable, and that every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

In this case they charged a first-class fare; he paid it. He bought a round-trip ticket and the Commission found that after he had completed a part of his journey he was taken from the first-class car and he was denied the right and privileges that other passengers enjoyed. It was admitted that the other passengers who held first-class tickets were allowed the use of the observation car and allowed the use of the sleeping cars or any other part of the train, but he was compelled to go up in a little Jim Crow car where persons who were only required to pay second-class fares of two cents a mile were placed. A ticket purchased at the rate of three cents a mile entitled one to have the facilities of the sleeping car, the observation car and other facilities, but Mr. Jones said that Congressman Mitchell could not have those privileges and the only reason he gave was that [fol. 503] he was a colored man.

There was plenty of room in the sleeper and in the observation car and had he been a white man he would have been allowed to use those cars. It is admitted in the pleadings and in the evidence here that there was plenty of space, unoccupied space, if you please, in the Pullman car.

The baggage of the Congressman was carried in the Pull-

man car but the Congressman himself was compelled to ride in the Jim Crow car.

The Interstate Commerce Commission and the Examiner found that this Jim Crow car was the same kind of a despicable, dirty, filthy car that was described in Councill v. Western & A. R. Co. 1 I. C. C. 339. That was one of the early cases, and the Commission stated at that time that was discrimination and a cease and desist order was given to the railroad company involved. That was followed in the case of Heard v. George R. Co., 1 I. C. C. 428 where they found a similar and identical situation to be unjust discrimination.

Those two cases are followed out in the case of Edwards v. Nashville, C. & St. L. Co., 12 I. C. C. 247.

[fol. 504] The dissenting opinions said that the Commission could not be consistent and hold this case not to be discrimination when those other cases were discrimination.

This is not a new matter. It has been before the courts in the early days, but the Federal Courts in which these cases have been brought, mostly suits for damages, have always held that if there was a first-class fare paid the party was entitled to first-class accommodations, and it is fundamental that state laws do not apply to interstate commerce.

Our suit is based upon that fact. That is the law, and the volume of traffic makes no difference.

The Court (Judge Sparks): Do you contend the Arkansas law is not before us, then?

Mr. Westbrooks: No, not as far as interference with interstate commerce is concerned. That question was brought up and we were therefore compelled to meet it by saying that even the Arkansas law provides for equal accommodations. All of the southern states where they have these separate-car laws, regardless of right or wrong or whether they are valid or invalid, provide for equal accom-

[fol. 505] modations but our contention in this case is that this was an interstate journey and as such the state laws have no application.

The leading case on that subject is McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151. In the State of Oklahoma they passed a separate-car law and suit was brought to enjoin its enforcement.

Judge Sanborn wrote the opinion in that case in the Circuit Court of Appeals. The questions were certified

to the Supreme Court of the United States where Mr. Justice Hughes delivered the opinion that the action was brought prematurely, that nobody had been hurt.

You and I both realize that sometimes they say you should not wait until you are hurt before you come into court for relief because after you are hurt you may not be able to ask for it. But in this McCabe case they laid down the fundamental principles which have been the law of this nation.

The conclusions of the Court, as stated in its opinion——

The Court (Judge Sparks): Don't refer so much to the [fol. 506] opinions. We will read those. Just make a short statement.

Mr. Westbrooks: All right.

I want to state that in that case they held the state laws did not apply to interstate passengers, though state laws may be valid so far as operations within the state.

The Court (Judge Sparks): Intrastate?

Mr. Westbrooks: Intrastate.

There is no quarrel about Arkansas having its own laws. The only point here is that this case involves an interstate passenger, in interstate commerce, and the state laws had no application whatsoever to this traveler.

In that case the Attorney General of the State of Arkansas made the same argument as is made here, that there were only a few people that wanted those accommodations. The Congressman has covered that point, but the conductor could not tell about the demand, and there is no evidence on that point. The Supreme Court said it is without merit, referring to the argument about the volume of the demand, for such a rule would make constitutional rights depend upon the number of people who may be dis- [fol. 507] criminated against.

Whether or not particular facilities shall be provided is a question for the company, but if they are provided then substantial equality cannot be refused and each individual entitled to first-class accommodations may not be refused them.

Very similar cases are the Councill and Heard cases, which I have cited. Then there is the case of Grey v. Cincinnati, reported in 11 Fed. 683. That case supports the proposition that where a person conducts himself in a proper manner after buying a first-class ticket he is entitled to equal accommodations.

The case of Murphy v. Western & A. R. C. O. in Tennessee held the same thing, that if you have a first-class fare you are entitled to first-class accommodations.

Hauck v. Southern Pacific held the same thing.

Some question arose before the Commission with respect to this being just a particular transaction involving just one man, but I think the McCabe case covers that. The McCabe case is followed by the Gaines case which is of recent origin.

[fol. 508] Mr. Justice Sanborn in the McCabe case said that the state law does not apply to interstate passengers. Certainly not, because Congress has the exclusive power to regulate interstate commerce and when they place that in the hands of the Interstate Commerce Commission that takes it out of the hands of the state to interfere, and the Commission has provided that there shall be no discrimination, no unjust preferences and that there shall be equal accommodations.

There can be no question about it, and the cases so hold, that if a person pays a first-class fare he is entitled to first-class accommodation. In this case Congressman Mitchell was given second-class accommodations because of a difference in race. He had to ride and accept accommodations given to those who paid only the second-class fare. There was only the Jim Crow car which was divided into three parts. The middle part was for ladies and gentlemen, one part for white smokers and the other part for colored smokers, but they all paid two cents a mile. Congressman Mitchell paid three cents a mile but he was ejected [fol. 509] from the observation car for no reason except that he was colored.

Before the Commission we said that our constitutional rights had been violated. The Commission said they had nothing to do with constitutional rights, but the Supreme Court in the McCabe case said that your constitutional rights are involved in such a case, that when you pay a first-class fare you are entitled to have such service.

There are cases in the 75 Arkansas, 93 Arkansas, 112 Arkansas and 120 Arkansas which hold that the accommodations must be equal. Therefore it would be no excuse, even applying the Arkansas law, to say that this man who paid a first-class fare may be put out because he is colored.

I also want to cite the case of Dickerson v. L. & N., in the 199 Fed.; and the American Sugar case in the 207 Fed.

The Court (Judge Sparks): Are you going to hand in a brief?

Mr. Westbrooks: We will submit you a brief on these things.

We also rely upon Section 2 of Article IV, that "the [fol. 510] Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." That is supplemented by Section 1 of the 14th Amendment:

"• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We claim that, being a citizen of the United States and having paid a first-class fare, Congressman Mitchell was denied the equal protection of the laws.

At the time of the passage of the 14th Amendment Congress was given the power to pass appropriate legislation, and that may be found in Title 8, Chapter 3, U. S. C. A. An interesting case along that line may be found in 100 U. S., In re Virginia.

In the case of Buchanan v. Warley, reported in 245 U. S., there was involved an ordinance that prohibited colored people from occupying certain places, and the old Enforcement Act was upheld.

[fol. 511] In this case we have a contract to be carried as a first-class passenger from Chicago to Hot Springs and return. That contract was broken. That contract was violated. There was a discrimination solely on account of color and race of that citizen of the United States, when the Supreme Court of the United States, every Federal Court and the laws and Constitution of the United States prohibit the very thing that was done here and admittedly done.

We submit, may it please the Court, that under the law and under the facts which are admitted and in justice to Citizen Mitchell, the order of the Interstate Commerce Commission be annulled and set aside as being contrary to law and not supported by evidence.

Mr. Payne: If the Court please, I appear primarily for the Interstate Commerce Commission. However, I am also

authorized to state that the United States submits this case on the strength of my statements. It seems to me it will be most helpful to the Court, first to refer to the facts as found by the Commission, for the purpose of emphasizing one or two matters that were not emphasized in the previous [fol. 512] argument; next, to take up the findings or holdings of the Commission and then to take up several law points.

I know the Court will read this report but nevertheless I would like to emphasize one or two things.

If the Court will turn to page 704 of the report it will be noticed that the Commission finds that the Complaint filed with the Commission mentions but a single incident of alleged discrimination and prejudice—the one described in this report.

The facts were that the complainant made a trip from Chicago to Hot Springs, Arkansas; he applied to the Illinois Central ticket agent. He testified that either that day or the day before he applied for through Pullman accommodations, but unfortunately there were no through Pullman accommodations to Hot Springs. The train out of Chicago is an Illinois Central train destined primarily for New Orleans, but there is a sleeper on that train that is transferred over to the Rock Island Railway at Memphis and goes on Rock Island train No. 45, Memphis to Hot Springs. [fol. 513] He wanted a drawing room on the Hot Springs sleeper, but there was no drawing room available. They had all been taken. He was given a compartment in a car destined to New Orleans. Upon approaching Memphis his baggage and he himself were transferred into the Hot Springs sleeper. The train with this sleeper on it left Memphis at 8:30 a. m., crossed the Mississippi River into Arkansas where there is the segregation law.

There was no Pullman conductor on the train. The one Pullman car was in charge of the porter. The train conductor in full charge of the train, when seeing Congressman Mitchell sitting in a seat in the body of a Pullman car first of all inquired of the porter whether there was a drawing room available. Unfortunately both had been taken. Prior to that the porter had told the Congressman, while he was still in the New Orleans car, that if there was a drawing room available in the Hot Springs sleeper he would be given that drawing room. Unfortunately they were both

taken and, in view of the Arkansas segregation law, the complainant was asked to move into the combination car. [fol. 514] As has been described, that was a combination coach of three sections: one for colored men smokers, one for colored women non-smokers and the third for white smokers.

The Court (Judge Sparks): Although he paid the railroad the full fare for the Pullman?

Mr. Payne: Yes, he had paid the through fare.

The Court (Judge Sparks): Clear through to Hot Springs?

Mr. Payne: No, sir.

The Pullman was paid for only to Memphis. He had bought the compartment to Memphis only, but he did have a refund coming to him on the railroad ticket.

The Court (Judge Sparks): Why?

Mr. Payne: He had purchased a three-cent-a-mile ticket.

The Court (Judge Sparks): What did they sell it to him for if they knew they could not give him accommodations clear through to Hot Springs?

Mr. Payne: It was assumed, perhaps, that he could get Pullman accommodations west of Memphis.

The porter told him if the drawing room out of Memphis was not taken he would be given that drawing room [fol. 515] in which event, of course, the three-cent-a-mile ticket would be the proper rate.

The Court (Judge Sparks): He did not tell him that until after they got his money, isn't that so?

Mr. Payne: They stand ready to make a refund of one cent a mile for the distance west of Memphis, but in the proceeding before the Commission there was no request or pleading asking for any reparation for damages of any kind, so that the question of whether he was overcharged is not involved in this suit.

The Court (Judge Sparks): It is just a question of mistreatment?

Mr. Payne: Yes. In other words, the Commission, if it finds a violation of the Interstate Commerce Act, is authorized to award damages, but none was asked for in this case.

The Court (Judge Sparks): They are also authorized to award any correction when one of our citizens has been abused. He was sold parlor accommodations——

Mr. Payne: The Commission found that he was sold those

accommodations because he wanted them and asked for them.

[fol. 516] The Court (Judge Sparks): They would do the same to me, because I want them and ask for them.

Mr. Payne: Yes, sir.

The Court (Judge Igoe): How else would they know he wanted it, if he did not ask for it?

Mr. Payne: They would not, of course, but they sold him the Pullman accommodations to Memphis.

The Court (Judge Igoe): But he had a first-class ticket to Hot Springs.

Mr. Payne: Yes, assuming he could get accommodations.

The Court (Judge Sparks): They didn't tell him anything different. He asked for parlor car accommodations to Hot Springs, Arkansas, and that is what they sold him, didn't they?

Mr. Payne: Yes.

The Court (Judge Sparks): Yes, and nothing was said about the possibility of his having to transfer when they got down to a certain place.

Mr. Payne: At least there is no testimony about it at all.

The Court (Judge Sparks): That is what happens, of course.

The Court (Judge Igoe): They sold him a first-class ticket.

[fol. 517] Mr. Payne: Three cents a mile.

The Court (Judge Igoe): I understand they sold him a Pullman car ticket.

Mr. Payne: No.

The Court (Judge Igoe): The first-class ticket would entitle him to ride in the Pullman car if he paid the extra Pullman fare.

Mr. Payne: Yes.

West of Memphis he rode the day coach, which was two cents a mile, so that he had a refund coming of one cent a mile which the railroads stand ready to refund, but that issue was not before the Commission.

The Court (Judge Igoe): But he did pay for a first-class ticket from Chicago to Hot Springs?

Mr. Payne: Yes.

The Court (Judge Igoe): And part of the way down there they put him into this other car?

Mr. Payne: Yes, and they say that he can get a refund

any time he wants it, but that was not before the Commission. After all, this is a suit on a review of a Commission order.

The Court (Judge Igoe): To review a Commission order about what?

[fol. 518] Mr. Payne: Simply dismissing his Complaint.

The Court (Judge Igoe): The Complaint is based on alleged discrimination only?

Mr. Payne: Yes.

The first paragraph of the Complaint did allege that there was an unreasonable charge because they sold him a three-cent fare through and only gave him two-cent accommodations west of Memphis, but the Commission said that no reparation or refund was sought before the Commission and noted that the railroads stand ready to make the refund, so that took Section 1 out of the case, leaving Sections 2 and 3.

There was also an allegation of the violation of Section 13, but the Commission found there was no violation of that section because that simply relates to the relationship between intrastate fares and interstate fares, and here the reasonableness of the Arkansas fares are not in issue at all. So there was no violation of Section 13, leaving for decision only the question of whether there was an unjust discrimination in violation of Sections 2 and 3.

Now, at the time this particular journey was made the [fol. 519] combination coach was an old affair and perhaps was not in the very best condition. All the testimony given by the complainant, who is the principal witness, and five other colored men who testified on behalf of the complainant before the Commission, all relates to that old accommodation; whereas the evidence shows and the Commission found that a few months after this transaction occurred the Rock Island put on a new coach on its train No. 45 west of Memphis.

Mind you, this case relates only to that train. There was no general allegation, but the evidence was directed to train No. 45 of the Rock Island, which is scheduled to leave Memphis at 8:30 a. m. and arrive at Hot Springs, Arkansas, at 1:05 p. m. the same day, a run of a little over four hours.

It was shown that this new combination coach is of all-steel construction with six wheel trucks, divided by a partition into two sections; one for colored and the other for

white passengers. It has comfortable seats, a linoleum floor covering, and is air conditioned. In each section there is a [fol. 520] wash basin, running hot and cold water, free paper towels and drinking cups and separate flush toilets for men and women.

While there is no smoking section, smoking nowadays generally is permitted in all sections of the coach, and sometimes in the Pullman cars.

The combination coach is as desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fares.

As for the Pullman, all they do down there is to put the negro in the drawing room. They leave the door open, and they charge him only the same fare. That was shown by the evidence and is found by the Commission.

The evidence further showed that that accomplished segregation and also complied with the state law.

Now, the Commission found and concluded that the present colored passenger coach and the Pullman drawing rooms meet the requirements of the Act; that is, the Interstate Commerce Act.

Mind you, this is here on review of a negative order of the Commission and, therefore, the only question before the [fol. 521] Commission and hence before this Court is whether there is a violation of the Interstate Commerce Act.

This complainant could not appeal to the Interstate Commerce Commission to enforce his constitutional rights. The question of the 14th Amendment is not here involved. That applies to the states. It says that no state shall do thus and so, and obviously whether there is a violation of the 14th Amendment is not a question for the Interstate Commerce Commission. It has no duties to perform in reference to the enforcement of the 14th Amendment. Its sole duty is to enforce the Interstate Commerce Act so that the sole question is whether there was a violation of the Interstate Commerce Act, and the sole question before this Court is whether the Commission committed any error of law, or in any other wise made an order dismissing a complaint which was beyond its authority. That is the sole and narrow question.

The Court (Judge Igoe): Is the Commission concerned with seeing that passengers get the accommodations for which they pay?

Mr. Payne: Oh, yes, if it is pleaded.

[fol. 522] The Court (Judge Igoe): Wasn't it pleaded here?

Mr. Payne: No, sir.

The Court (Judge Igoe): Do you mean they did not set up in their Complaint that this man who bought a first-class ticket was put in a second-class car?

Mr. Payne: The Commission found that the railroads stand ready to make the refund and when that refund is made, why, his rights under Section 1 are——

The Court (Judge Igoe): Just what does a contract with a railroad company mean?

Mr. Payne: If you are charged more than you should pay you will get a refund.

The Court (Judge Igoe): Suppose he buys first-class passage and wants his first-class passage instead of a refund? What would you do about that? What will the Commission do about it?

The Court (Judge Sparks): That is the point here.

Mr. Payne: This plaintiff here made this one trip only, as far as the record shows.

The Court (Judge Sparks): What is the difference? I don't blame him for not going more than once.

Mr. Payne: Suppose he would be charged five cents a mile instead of three cents. That might happen through an error. Then, if a refund is made his rights are wholly [fol. 523] given to him.

The Court (Judge Sparks): Why assume an error? There was no error here. He paid three cents because they charged it to him.

Mr. Payne: Yes, but they are now ready and willing at any time to make a refund.

The Court (Judge Sparks): And that answers the whole thing?

Mr. Payne: That answers any question of overcharge.

The Court (Judge Sparks): It is not a question of overcharge. It is a question of getting the accommodations.

Mr. Payne: It is a question of whether the accommodations furnished on that train to white passengers, as compared with those furnished to colored passengers, is an unjust discrimination and in violation of the interstate commerce provisions.

The Court (Judge Sparks): Unjust or unequal, aren't they the same thing?——

Mr. Payne: No, sir. That is just the point I want to make, your Honors. The Interstate Commerce Act does not provide for equality of accommodations.

The Court (Judge Sparks): At least from what the [fol. 524] gentleman said I thought so.

Mr. Payne: That is the Arkansas State law.

The Court (Judge Sparks): Do you agree that the Arkansas State law has nothing to do with this?

Mr. Payne: I do not think so.

The Court (Judge Sparks): They say so, so we will admit that.

Mr. Payne: This is what the Commission found on that score.

I would rather call your Honors' attention exactly to what the Commission held.

Reading from the Commission's decision:

"* * * Complainant also relies on the Supreme Court's conclusion in McCabe v. Atchison, T. & S. F. R. Co., Supra, to the effect that the Oklahoma statute had to be construed as applying only intrastate because there had been no construction to the contrary by the state court. Be that as it may, the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and while it is not for us to construe the statute, we think, in view of its general terms, that until further informed by judicial determination, defendants are justified, as a matter of self-protection, in as- [fol. 525] suming that it applies to interstate, as well as intrastate, traffic. What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute."

So we come back to the only statute which the Interstate Commerce Commission is authorized to enforce, and that is the Interstate Commerce Act which provides, in Sections 2 and 3, that discriminations shall not be unjust and prejudices shall not be undue.

Now, there are many decisions of the Supreme Court which point out that not every discrimination is violative of the Interstate Commerce Act, but only those which are unjust or undue. The Commission finds here that, in view of the fact that colored passengers are put into the draw-

ing room and charged only the seat fare, there is no discrimination, no unjust discrimination.

Apparently he is not satisfied here with being given the privilege of riding in the drawing room at no extra fare, but he says further he ought to have the range of the train. [fol. 526] In view of the Arkansas statute there must be segregation, so that he could not have the range of the train while in Arkansas. There must be segregation, and the only way, therefore, to cure the situation, the Commission found, would be to run extra cars—two dining cars, two sleeping cars and two observation cars, if that were possible, or to construct partitions.

But the Commission said the demand for these first-class accommodations is so light that it would be an unnecessary expense to provide these extra cars, or even partitions and, therefore, the discrimination is not unjust or unreasonable.

The Court (Judge Sparks): A colored man gets on at 8:30 and rides until 1:00 o'clock without dinner, isn't that so?

Mr. Payne: There is no evidence to that effect.

The Court (Judge Sparks): I am assuming that.

Mr. Payne: There is not a word of evidence on that.

The Court (Judge Sparks): I am not talking about the evidence. You know what I mean. I am talking about a person getting anywhere near equal opportunities. I do not know what you mean by equal protection, but I mean the same, or approaching the same.

[fol. 527] Mr. Payne: If you are going to go outside of the record you can assume——

The Court (Judge Sparks): Not any more than you are.

Mr. Payne: He can send into the dining car for lunch if he wants to.

The Court (Judge Sparks): I am not talking about that phase of it. Go ahead.

Mr. Payne: I want to call your Honors' attention to the fact that while there is talk in the dissenting opinions about the dining car, there is no evidence in the record that this complainant wanted to buy a meal in the dining car.

There is clear evidence he would have been given the drawing room, if available, and it is not held for white persons. Had he applied for it he could have reserved it in advance. There would have been no case at all if complainant had been more diligent and had reserved the drawing room. Then the whole case disappears. Drawing rooms

are usually considered to be better accommodations than a seat in the body of the car, but this complainant is not satisfied with being in the drawing room although given [fol. 528] superior accommodations at the seat fare.

The Commission holds that is not an unjust discrimination. That is, it is not violative of the Interstate Commerce Act and, as this Court knows, since the Transportation Act of 1920, Congress has had a policy for the development and maintenance of national adequate transportation service. So that in considering or applying every provision of the Interstate Commerce Act the Commission must keep that general congressional policy in mind.

The question is whether there is an undue or unjust discrimination, and that depends always on the volume of traffic.

For instance, a shipper on a branch line where the traffic is light may pay a higher freight rate than the shipper on the main line.

In the northeastern part of the country freight rates are the lowest because of the heavy volume. In the south the rates are higher, and in the southwest, where traffic is light, the rates are still higher. Volume of traffic is something that affects the cost of the service and has always been held to be a factor in determining whether a discrimination is unjust or undue.

[fol. 529] That was the view of the Commission here.

The Commission finds, that so far as coach passengers are concerned, there is now no discrimination whatsoever because of this new modern air conditioned coach which is divided, two-thirds for the colored passengers and one-third for white passengers. The accommodations in that new car are just as good, the Commission finds, as the accommodations for the white passengers. In that respect there is absolute equality as between white and colored.

Now, what about the colored passengers that want Pullman accommodations? The conductor said there have only been a few in the thirty-two years that he has been on this run—ten or twelve in that whole time—that have applied for Pullman accommodations.

In view of the light demand and in view of the fact that ordinarily the drawing room takes care of the colored passengers, the colored passengers are given virtual equality by being given a superior accommodation at only the seat fare.

On the question of whether there should be two dining cars, two observation cars, or whether expensive partitions [fol. 530] should be constructed, I want to point out that the Rock Island is the only one that is the principal defendant, and it is in the hands of receivers. They cannot afford to construct a lot of expensive partitions to take care of the very slight demand of colored passengers.

The Court (Judge Sparks): If there weren't any discrimination maybe there would be more demand than there has been in recent years. They knew they couldn't get the accommodations even if they wanted them.

Now, that does not teach us much, does it?

Mr. Payne: I do not know.

You might as well assume that ordinarily they cannot afford it. If there were a great demand for Pullman accommodations they would get it. They are not denied Pullman accommodations in the north. You gentlemen have traveled. I have traveled about 200,000 miles in the United States on Government business, in all sections of the country, and I think it is a general experience that the volume of colored passengers is very light.

Imagine having to give all those separate accommoda- [fol. 531] tions on the western transcontinental trains running to the coast. You would have to have two soda fountains, and so forth. This is a question within the power of the Commission. It is within the discretion of the Commission to say as a matter of fact——

The Court (Judge Sparks): If that is so then we have nothing to do with it, is that right?

Mr. Payne: That is really——

The Court (Judge Sparks): That is your argument, isn't it?

Mr. Payne: You have something to do with it, your Honors, but I say that the review is limited, and I say that the question of whether a discrimination is unjust or undue and therefore in violation of the Interstate Commerce Act is a question of fact for the Commission and not a question of law. Your Honors review all questions of law or questions of statutory authority and the question of whether there is a sufficiency of evidence.

You recall the Rochester Telephone decision which held a negative order is reviewable, but the Court said only questions affecting constitutional power, statutory author-

[fol. 532] ity and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Supreme Court said, the Commission's order becomes incontestable.

Later on the Court said that the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. I point out to your Honors that here there is a rational basis for the Commission's action.

The Court (Judge Sparks): Is that a question of fact or a question of law?

Mr. Payne: Well, I think that is a question of law. The Court determines whether there is a rational basis for the Commission's act, but I say here there is a rational basis because the Commission finds that the use of the present coach and the use of the drawing rooms in the Pullman is a compliance with the Interstate Commerce Act.

What rights this plaintiff may have under the 14th Amendment is not before this Court. It perhaps is for some other judicial body, but this is a court of special jurisdiction to determine these questions as to whether the Commission's order violates any of these matters that I have [fol. 533] referred to.

The Court (Judge Sparks): Then this would hardly be a three-judge case, would it?

Mr. Payne: That is why you are a three-judge court.

I want to call attention to another thing that supports the Commission's finding of lack of demand.

The Complaint to the Commission did not allege that the complainant did ever have occasion to make this trip to Hot Springs again. The record shows he went down there because he was ill, he had a low blood pressure and he went down there for treatment. There has been no showing that he has a law office down there, that he has property there or that he has occasion to make that trip from time to time, but there is only evidence of just that one trip.

Now, he asks for an order for the future applying not for two years, as the Commission's orders formerly applied, but now the Commission's orders operate indefinitely in the future, and all because he made the one trip, without any showing of an intention to make another trip. On that basis [fol. 534] he asks for a permanent order against the carriers.

Furthermore, there is nothing in this record, either in the Complaint or elsewhere, to show that he is authorized to speak for anyone else.

The Court (Judge Igoe): What kind of an order does he want against the carrier?

Mr. Payne: He wants an order requiring the alleged discrimination to be removed for the future, and the Commission found the only way it could be removed would be by the running of extra cars or by the construction of partitions on all cars run—an order operating indefinitely in the future, without any showing that he is going to use it.

He cannot champion the rights of the colored race in general. He can speak only for himself, and that was the basis of the decision in this very McCabe case that he refers to.

The Supreme Court held that there were five negroes who were the plaintiffs, but there was no showing they had applied for accommodations and had been denied equal accommodations. There was a further allegation there that there would be a multiplicity of suits, because there were 50,000 [fol. 535] negroes in Oklahoma.

But the Supreme Court said that the particular complainants in that case cannot speak for the 50,000 negroes in Oklahoma, they can only speak for themselves, and their case was dismissed because of a lack of showing of an interest in the matter. That is another point I have here, closely connected with the question of lack of demand.

There were five witnesses before the Commission who testified they had made trips down there from time to time, but they all referred to the condition of the old coach. Not one of them mentioned the new coach, although Congressman Mitchell's trip was April 20 and 21, 1937, and the hearing before the Commission was held March 7, 1938, nearly a year afterwards. None of those witnesses, nor the complainant himself, even knew that they had put this new car on.

Another thing, although there was no testimony that he ever intended to make this trip again he did find occasion to say that if the law puts a burden on them and puts them to an expense he wants that expense put on them. Has he a standing to put that expense on the railroads when everyone [fol. 536] knows the condition of the railroads?

Everyone knows of the Congressional policy to let the railroads live if they can under private ownership. Nevertheless he would put that expense on them, that extra burden, even though he utterly failed to make any showing he would ever have occasion to use the service again.

He is seeking to invoke the extraordinary remedies of equity. Has he a standing here to invoke that remedy when he fails to show that he will have occasion to use that train again?

One of the five witnesses who testified before the Commission said the last trip he made was in 1926, eleven years previously. Another witness said that he had always traveled in the coach and never traveled in the Pullman and, asked if he ever tried in travel in the Pullman, he said: "No, certainly not." He said he never made any attempt to ride in the Pullman.

I say those things all support the findings of the Commission that there was a lack of demand, and there is no requirement of absolute equality. The Supreme Court has held over and over again that they are interested only in [fol. 537] discriminations which are unjust.

Here the discrimination, if there is any, is not substantial. Ordinarily drawing rooms are considered more desirable accommodations. The plaintiff here has a sentiment. That is about all. He has no legal right. There is no legal right to maintain a suit, and that is something that goes to the merits, as decided by the Supreme Court in the General Investment case. The Court has jurisdiction to hear the case and, therefore, the decree of dismissal should be for want of equity rather than for want of jurisdiction.

There are many, many Supreme Court cases where direct suits have been instituted to maintain constitutional rights, and the Court has held the party must show that he is affected. The Supreme Court has said that the plaintiff cannot succeed just because somebody else may be hurt. There are many other cases I could cite in a brief, if the Court desires it.

I think that is all, unless your Honors have some further questions.

The Court (Judge Sparks): Is there anything further, gentlemen?

[fol. 538] Mr. Hughes: Your Honors, will you care to hear from the trustees of the Chicago, Rock Island and Pacific Railway Company?

The Court (Judge Sparks): I am not expressing what we care to hear. How many arguments do you want to present? Do you want to consume much time?

Mr. Hughes: Not very much.

The Court (Judge Sparks): Have you any other arguments you are expecting to make?

Mr. Roemer: I appear for the Pullman Company but in all probability we will make no oral argument at this time.

The Court (Judge Sparks): We do not want you to repeat anything that Mr. Payne has covered.

Mr. Roemer: We will try not to.

The Court (Judge Sparks): If you have anything additional we will hear that.

Mr. Hughes: I am appearing for the trustees of the Chicago, Rock Island and Pacific Railway Company, which railway has been referred to more than once this morning, I think I should say, and it is appropriate for me to say, that a railroad like the Rock Island does not make and has nothing to do with the segregation laws. They are imposed [fol. 539] upon the railroad by the respective states in the expression of the legislative policies of those states.

The Rock Island serves fourteen states. Nine of them have no such laws and the question of segregation or of accommodations does not arise in those states. In the other five, including Arkansas, such laws do prevail as an expression of the state legislative policy.

Necessarily the trustees of the Rock Island have no views to express whatsoever upon the merits or demerits, the right or wrong, of the legislation involving public sentiment, public policy, controversy and the delicacy of the interracial feeling. The railroad is a subject and has nothing that it can do with respect to those laws. I am saying that in order that you may realize the viewpoint immediately of the railroad in a case of this sort. Therefore I caution the Court and urge it not to consider anything that I may say on this subject as an expression of opinion on the right or wrong of this very delicate question.

I confess a confused state of mind as to just what course the plaintiff's case has taken here this morning. In his [fol. 540] Complaint before the Interstate Commerce Commission the complainant alleged a violation of various sections of the Interstate Commerce Act and also alleged a violation of the 14th Amendment—a rather peculiar allegation in a Complaint before the Commission.

I need not remind the Court that the 14th Amendment is a direction against the states and it has nothing to do with

the powers of the Interstate Commerce Commission whose functions are determined and restricted by the Interstate Commerce Act. I do not know whether the 14th Amendment is in the case here today or is not.

In the petition filed with the Court it is alleged that the findings of the Commission constitute a denial to plaintiff of due process of law as guaranteed by the 14th Amendment of the United States Constitution.

It is alleged, on page 47 of the petition, that the order and findings of the Commission are a denial of the equal protection of the laws to the plaintiff as guaranteed by the 14th Amendment of the United States Constitution.

Now, this petition before your Honors is attacking on [fol. 541] various grounds an order of the Commission in which it exercised a judgment that had been invoked by this plaintiff. He might have proceeded in other ways if the 14th Amendment were involved. Most cases involving this delicate subject of segregation go through the state courts in which the states interested themselves are heard.

If this plaintiff thought the Arkansas statute was an infringement upon the 14th Amendment he might have proceeded in a court to enjoin its enforcement and there might have had a determination of his right under that amendment. He might have, if he thought that the state law of Arkansas requiring equal accommodations was being violated by the Rock Island or any other railroad, tested the question in an Arkansas State Court. The State Court of Arkansas has the determination as to what constitutes equal or unequal accommodations within the meaning of the Arkansas statute.

Now, it was obvious from the direction of the case before the Commission, and the Commission report refers to it, that the major objective of this proceeding is not so much a question of accommodations as it is an overthrow [fol. 542] of the segregation statute of Arkansas. If it is invalid under the 14th Amendment it cannot be tested before the Interstate Commerce Commission.

I have mentioned various court proceedings which he might have adopted to test it out, but one other method is by congressional legislation. It is well settled that Federal Courts will take judicial notice of the journals of Congress. Congressman Mitchell introduced into the House on January 5, 1938, House Bill 8821, and on January 3, 1939, a different Congress, he introduced House Bill

182, each of which Bills was respectively referred to the House Committee on Interstate and Foreign Commerce.

In those Bills he undertook to have Congress legislate on this subject and prohibit the segregation of any interstate passengers on railroads by virtue of any creed, color or race.

Those Bills, so far as I am advised, are still in the hands of the committee. A very serious national question is involved. It involves, as your Honors well know, the public policy of probably a quarter of the states of the Union.

[fol. 543] The 14th Amendment especially empowers Congress to enact legislation to enforce that amendment. Perhaps Congressman Mitchell is on the right and sound track when on a question of such enormous popular importance he is appealing to Congress itself. Congress may give consideration to the question as to whether it desires to adopt as a national policy the views that Congressman Mitchell is urging. Certainly I think the judiciary, state legislatures, the Congress and the state attorneys general and lawyers generally would receive a start if some day they found the Interstate Commerce Commission making such a finding as this:

"We find that the statute of the State of Arkansas infringes the 14th Amendment of the Constitution of the United States and is, therefore, null, void and invalid."

Of course, a railroad may not infringe the 14th Amendment. It is subject to the state law. The question is whether or not that law infringes the 14th Amendment, and that is not for the Interstate Commerce Commission to determine. Its jurisdiction is wholly within the limits of the Interstate Commerce Act.

[fol. 544] I would like to refer, if I may, to two cases cited by the plaintiff, because those two cases rather illustrate what I meant by my previous remarks.

He referred to the Gaines case in the State of Missouri. That was the case where a colored student undertook to enter the University of Missouri, a state institution, and under the state law he was not admitted. The State of Missouri had a Segregation Act. Now, that was a case in which the attack was made directly upon the statute, and in that attack the state itself was heard. The denial of entrance to the university was continuous. It was not a casual incident such as you have before you here. It was continuous, and so this young student sought a writ of man-

damus for admission to the University of Missouri Law School which was exclusively for white students.

When that case reached the Supreme Court of the United States that Court held the state law infringed the 14th Amendment and it directed the issuance of a writ of mandamus to admit this individual to the state university. I mention that because there is a case where the state itself [fol. 545] was heard on its statute. It was a party to the case.

The State of Arkansas cannot be brought into this case because it is not a common carrier engaged in interstate commerce and is not subject to the Interstate Commerce Act. Nor in the Gaines case, which I have mentioned, was there a Commission charged with the duties of passing on questions of that sort as we have here.

Congress has set up the Interstate Commerce Commission to pass upon these questions of discrimination and Congressman Mitchell invoked that Commission, not some other court. He invoked that Commission and the Commission heard his evidence and has acted upon it. I will not quote literally because I haven't the decision before me, but the Supreme Court has said the Commission is informed by the experience of the years and the due consideration of the question before it; and in the case of United States v. The Chicago Heights Trucking Company, decided just a week ago, the Court said, with respect to the Commission's order: "The judgment so exercised being supported by ample evidence is conclusive."

Your Honors, I might say incidentally that this record [fol. 546] here shows that the plaintiff here has pending in the Circuit Court of Cook County a tort action for $50,000 against the carrier defendants as a result of this incident.

The facts before the Commission have been rather fully presented by counsel for the Government. The Rock Island Railroad does provide accommodations for colored passengers, and that is really the final conclusion of the Interstate Commerce Commission and it finds on the record and the evidence before it that those accommodations are adequate and meet the requirements of the Act.

We may not assume, the Commission cannot assume, that because this one incident happened three years ago, it is happening every day. There is no proof that it has happened at any time either before or since. That train runs every day, and there have been a thousand trips of that

train since this incident and since there is a failure of proof we may assume there have been no further incidents of this kind. At least the accommodations are found by the Commission to be ample.

If this plaintiff had shown some diligence in making reservations there we would have a different proposition. [fol. 547] The capacity of a train, as we all know, is limited. For the colored passengers provisions are made in the drawing room, which complies with the state statute. That, the Commission says, is an adequate provision.

We have all had the experience of being unable to get accommodations at the last minute. That is a common, human experience. Capacity is not unlimited, and Congressman Mitchell asked for reservations late in the afternoon of the day on which he left for Hot Springs, late in the afternoon of April 20, and the train left around 6:00 o'clock.

If we are going to do some assuming we may just as well assume that if he had waited until the next day the accommodations would have been available to him.

There is no proof, as I have said, and I repeat, that there has not been a single incident of this sort before or since and therefore the Commission found no occasion for issuing a cease and desist order and dismissed the Complaint.

The Court (Judge Sparks): Is that what they sought, a cease and desist order?

[fol. 548] Mr. Hughes: A cease and desist order, requiring the railroads to cease and desist.

As an individual proceeding, the question arises, what was it that the carriers were to cease and desist doing? As the counsel for the Government has explained to you, Congressman Mitchell has made that one trip. Are we to be required by the Interstate Commerce Commission, which has dismissed his Complaint, to cease and desist discriminating against Congressman Mitchell?

I do not believe, your Honors, that you may find any error of law in the Commission's report. In any event the Commission said it was not considering a constitutional question, but rather questions under the Act, that is, the Act to regulate commerce, and that is true. That is the only jurisdiction the Commission has.

Again, the Commission said it was not for it to construe the statute of the State of Arkansas and at the hearing Congressman Mitchell—and I have the transcript here—

said he asked the Commission to enforce the Arkansas statute. He explicitly said that and you will find it in the record.

[fol. 549] This morning Congressman Mitchell, arguing the case himself, repeated that statement that he had asked the Commission to enforce the Arkansas statute requiring equal accommodations, which answers itself. The Commission has no such power.

It was later, your Honors, when counsel was arguing, that the question arose as to whether the Arkansas statute was in or out. I think he said it was out.

The Court (Judge Sparks): Mr. Westbrooks said that.

Mr. Hughes: Yes.

I am in a state of confusion as to whether it is in or is not. At any rate we think your Honors should not set the Commission's order aside because there is no error in it. The judgment of the Commission, we believe, on the evidence before it is conclusive if there is no error in law.

The plaintiff has had his day before the Commission, the body whose jurisdiction he invoked. The Commission has acted and there is no error in its reports and we submit you should dismiss this petition before you.

The Court (Judge Sparks): Is there anything further?

[fol. 550] Mr. Westbrooks: Yes, sir. We would like ten minutes between us, Judge.

Mr. Mitchell: If the Court pleases, in the first place I should like to know from counsel—not now, but he can answer me privately, how many times must a colored man apply for equal accommodations before he is entitled to complain about not receiving those accommodations? Must I make twenty-five trips to Hot Springs, Arkansas, before I can come to a Commission that is supposed to guarantee the rights of those who travel as interstate passengers, before I have the right to come to the Commission that is set up for that purpose and say to them: "This law which you are supposed to enforce has been violated and I am entitled to relief and you are the body to administer that relief"?

This without doubt is one of the most pathetic scenes I have seen. My Government, with its representatives, say to my race and to my people that it does not make any difference, that conductors can operate on railroads for thirty-two years and they can go into court and say that they have

denied us first-class accommodations every time and that they will continue to deny them.

[fol. 551] That is what the conductor said. My Government, represented by the Attorney General's office, comes to me and says: "This is your portion in a democracy." He stands before a court that is supposed to enforce the laws of our country and that is the way he talks. I saw an inscription on the wall in Judge Wilkerson's room this morning saying that justice should be administered without fear or favor. Then my Government argues that these treatments must be constant before I can complain.

The point also was made that I must make an application for accommodations several days in advance. Is that discrimination? Would a white man have that to do? There were many discrepancies in the facts as recited here, but your Honors will find those points in the evidence.

As a matter of fact, I have been down to Hot Springs several times since this thing happened. Of course, I have not gone down there on the Rock Island Railroad. I have gone down on the Missouri Pacific, which is a little more liberal and where you can get accommodations and something to eat.

I know what happened. After I filed this Complaint the [fol. 552] Rock Island Railroad did junk the old car that should have been junked many years before the Complaint was filed and did put on a car which provides second-class accommodations for negroes. But at this very moment it is impossible for a negro whether you are one or five hundred, to get first-class accommodations on that Rock Island Railroad down there, and these gentlemen know it.

The conductor said that at least one negro applied for first-class accommodations every year, that he turned them down and that he will continue to do that. That was the testimony of the agent of the Rock Island. How can there be a big demand for such accommodations if you turn a man down every time he asks for such accommodations? I wish these gentlemen would place themselves in our position. I wish they could be black for a moment and know what a black man has to suffer here. I do not believe that the railroad would then listen to the puny statements made by these gentlemen who have joined, I am almost ready to say, the Nazis in enforcing these terrible things upon a race that is loyal to their country.

[fol. 553] That is all.

Mr. Westbrooks: Your Honors, in order to get a cease and desist order, which was our only remedy, we had to file a complaint with the Commission in accordance with the Interstate Commerce Act. Then after the hearing before the Commission, in order to follow out the procedure, we had to come into this court. As to whether this involves a constitutional question, the Supreme Court of the United States in the McCabe and the Gaines cases has said it is a constitutional question.

The Interstate Commerce Commission has heretofore, in the Heard and Councill cases, said it was a constitutional question.

I would like to have the Court's permission to file a copy of my initial brief. I will have three copies of it for your Honors.

The Court (Judge Sparks): All right.

Mr. Hughes: May we have leave to file our briefs?

The Court (Judge Sparks): Yes, sir. We expect you to have briefs. I am sorry you do not have them here today, because these things ought to be gone into immediately.

Mr. Payne: The case has been pending for a year. Was a [fol. 554] brief filed? I have not been served with a copy of it.

The Court (Judge Sparks): We do not have a brief from anybody yet.

Mr. Hughes: I understand that plaintiff's counsel would ask for leave to file briefs.

The Court (Judge Sparks): Mr. Westbrooks, you will have to have enough for these counsel so that they may respond to your brief.

Mr. Westbrooks: We will give them each a copy.

Mr. Hughes: If they are going to be permitted to file their brief that they filed before the Commission, including the exceptions and all that, may we have leave to file our reply to whatever they present to your Honors?

The Court (Judge Sparks): Yes.

Mr. Westbrooks: I understand they have filed copies of the exceptions.

The Court (Judge Sparks): What exceptions?

Mr. Payne: Exceptions to the Examiner's proposed report, and they are in evidence.

The Court (Judge Sparks): Is the brief in evidence?

Mr. Payne: The brief is not filed as evidence.

Mr. Westbrooks: Counsel obtained leave to file our ex-

[fol. 555] ceptions before the Commission, and they are in evidence. Therefore I want to file the rest of the papers that we had before the Commission as our brief and contentions of law.

Mr. Payne: Do you want to file the brief as a brief or as evidence?

Mr. Westbrooks: What do you want to file the exceptions for?

Mr. Payne: As evidence.

Mr. Westbrooks: How can you file my exceptions as evidence?

Mr. Payne: Well, they were.

Mr. Westbrooks: Well, then I ask leave to submit the whole thing.

The Court (Judge Sparks): Put them in, and they will have an opportunity to answer.

When can you file them?

Mr. Westbrooks: I can file them today.

Mr. Hughes: What he is asking to file is not a new brief for the Court, but the brief he filed before the Interstate Commerce Commission before the submission of the case to that body.

The Court (Judge Sparks): Were the same questions involved as were presented here this morning?

[fol. 556] Mr. Westbrooks: Yes.

This will help your Honors because in the Commission we are compelled to abstract the evidence and submit our law, and these matters which I desire to file contain the law before the Commission and which we now urge.

The Court (Judge Sparks): Then you want to file them in lieu of a brief now?

Mr. Westbrooks: Yes.

Mr. Payne: May the Court please, the United States and the Interstate Commerce Commission naturally were not defendants before the Commission. So if the plaintiff files his brief before the Commission I should like to file our brief on behalf of the United States.

The Court (Judge Sparks): He is filing today, and you can take it with you.

How long will it take you?

Mr. Payne: It is a question of mechanics mostly. Would a mimeographed brief be satisfactory?

The Court (Judge Sparks): Yes.

Mr. Payne: We will get that here in ten days, two days for mailing and two days for mimeographing.

The Court (Judge Sparks): Now, gentlemen, how about [fols. 557-558] special findings?

Mr. Payne: I suggest that findings be filed within ten days, if requested.

The Court (Judge Sparks): Yes, I think we should have special findings.

Mr. Hughes: Will your Honors want those in advance of your decision of the case?

The Court (Judge Sparks): Yes, and your findings also.

Mr. Westbrooks: Yes.

The Court (Judge Sparks): All right.

(Which were all the proceedings upon the hearing of the above-entitled cause).

[fol. 559] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' PRECIPE FOR TRANSCRIPT OF RECORD—Filed September 9, 1940

To the Honorable Hoyt King; Clerk:

In preparing the transcript of record in the above-entitled cause on appeal to the Supreme Court of the United States, please include therein, in addition to the matter specified in the plaintiff's praecipe, the following:

1. Certified copies of the following documents from the record before the Interstate Commerce Commission in Arthur W. Mitchell v. Chicago, Rock Island & Pacific Railway Company et al., Commission's Docket No. 27844, introduced in evidence before the District Court as plaintiff's Exhibit No. 1:

(a) Complaint filed September 2, 1937,

(b) Transcript of the stenographer's notes of the hearing held March 7, 1938, at Chicago, Ill., before Examiner W. A. Disque, and all exhibits filed at said hearing,

(c) Report proposed by William A. Disque, Examiner, filed May 5, 1938,

(d) Report and order of the Commission filed and entered November 7, 1938,

(e) Order of the Commission entered March 6, 1939.

2. Certified copy of exceptions filed with the Interstate Commerce Commission by complainant Arthur W. Mitchell to the Examiner's proposed report and the reply of defendants to those exceptions, introduced in evidence before the District Court as defendants' Exhibit No. 1.

[fols. 560-561] 3. Transcript of oral argument before the District Court May 27, 1940.

4. Intervention of Interstate Commerce Commission.

Frank Coleman, Solicitor for United States; J. Stanley Payne, Solicitor for the Interstate Commerce Commission.

Dated at Washington, D. C., September 7, 1940

[fols. 562-565] DEFENDANT'S EXHIBIT 2

Interstate Commerce Commission

Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of Exceptions on behalf of Plaintiff, filed May 26, 1938, in Docket No. 27844, Arthur W. Mitchell v. Chicago, Rock Island & Pacific Railway Company Trustees et al., the original of which is now on file and of record in the office of said Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 20th day of May, A. D. 1940.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 566] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 27844

ARTHUR W. MITCHELL, Complainant,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of the Chicago, Rock Island & Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation; and Pullman Company, a corporation, Defendants.

EXCEPTIONS ON BEHALF OF PLAINTIFF TO REPORT PROPOSED BY WILLIAM S. DISQUE, EXAMINER—Filed May 26, 1938

Comes now the complainant, Arthur W. Mitchell, in the above entitled proceeding, and excepts in the following particulars to the findings and conclusions in the report proposed by William S. Disque, Examiner.

I

The failure of the Examiner to sustain the motion of the complainant to strike the answer of the Chicago, Rock Island & Pacific Railway Company, hereinafter called the Rock Island.

Because the answer of the Rock Island violates the specific rules of this Commission:

[fol. 567] (a) In that it does not fully and clearly advise the Commission and the complainant of the nature of the defense.

(b) It does not specifically deny each material allegation of the complaint.

(c) The answer merely denies the alleged discrimination is unjust.

(d) The answer merely denies that the prejudice is undue.

(e) The answer merely denies that the prejudice and discrimination is unreasonable. (Tr. 5-6).

II

The complainant excepts to the statement of the Examiner on page 8, paragraph 1 of the proposed report which states:

"For the purposes of this proceeding the complainant accepts segregation under the Arkansas Statute, but urges that defendants, to remove and avoid unjust discrimination, and prejudice, are bound to provide the same equipment and accommodations for colored passengers as for white passengers."

Because the complainant does not accept segregation under any conditions, and the record fails to show that complainant has accepted segregation under the Arkansas statute.

III

The complainant excepts to the remaining portion of page 8, paragraph 1 of the said report, which is as follows:

"In other words he says that if defendants are to continue the Pullman sleeper, dining car and observation-par-
[fol. 568] lor car for white passengers, they must provide similar facilities, three extra cars, for colored passengers paying first-class fares plus the additional charges provided by tariff for seat space."

Because there is no claim that extra cars must be provided to accommodate colored passengers paying first-class fares plus additional charges provided by tariff for seat space as the Pullman sleeper, dining car and observation-parlor car were traveling in interstate commerce and contained sufficient first-class accommodations and facilities for all first-class passengers.

IV

The complainant excepts to the statement in the proposed report (p. 8, par. 2) which is as follows:

"It is sufficient to say that a first-class ticket was furnished and charged for because complainant wanted it, and after it developed that the first-class accommodations west of Memphis were all taken by other passengers, defendants offered to refund the difference."

Because there is no evidence in the record to substantiate this statement as there were sufficient unoccupied seats in the Pullman car and in the observation-parlor car, both of which were traveling in interstate commerce and provided for the accommodation of all first-class passengers with the exception of colored passengers traveling in interstate commerce who had paid first-class fares.

[fol. 569] V

The complainant excepts to the entire paragraph 3 on page 9, and particularly to the following findings:

(a) The present colored coach meets the requirements of the law.

(b) As there is comparatively little colored traffic and not likely to be such demand for Pullman, dining, and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars the discrimination and prejudice is plainly not unjust nor undue.

(c) "The complaint should be dismissed."

Because it is undisputed that the so-called "colored coach" provides only second-class accommodations (p. 7, par. 1 of the proposed report) and the requirements of the law governing interstate commerce are that persons paying first-class fares must receive first-class accommodations.

Because the statement contained in the proposed report of the Examiner concerning "comparatively little colored traffic" makes the constitutional right of the complainant depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right to substantial equality of treatment of persons traveling under like conditions is a personal one and the complainant as an individual was entitled to the equal protection of the laws. McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U. S. 151, 161-162; 35 Sup. Ct. 59; 59 L. Ed. 169; [fol. 570] Aff. 186 Fed. 966; 109 C. C. A. 110.

Because the undisputed testimony shows that first-class accommodations and facilities were denied to the complainant although he had paid for a first-class ticket which entitled him to first-class accommodations, and that he had received first-class accommodations as far as a point slightly beyond Memphis, Tennessee, and further that he was denied first-class accommodations and facilities by the Rock Island for a portion of his interstate journey, as alleged in his complaint.

VI

The complainant excepts to the finding of the Examiner that the discrimination and prejudice charged in the complaint and substantiated by uncontradicted evidence is not unjust nor undue.

VII

The complainant excepts to the finding of the Examiner, page 7, paragraph 2, of the proposed report, which is as follows:

"Only about one Negro to 20 white passengers rides this train from and to points on the line between Memphis and Hot Springs and there is hardly ever a demand from a colored passenger for Pullman accommodations; the conductor recalled but ten or twelve in the past 32 years of his service on the train."

[fol. 571] Because this statement of finding is not supported by the evidence and further, because the witness, A. W. Jones, conductor for the Rock Island, states that he had never sold any colored person any space or accommodations in the Pullman car during his entire service (Tr. 164; initial brief of complainant, p. 46).

He further states: "I told him he was a colored man and could not ride in those first-class accommodations" (Tr. 168; initial brief of complainant, p. 46).

He further states: "No colored persons are allowed to ride in the observation car *even if they have first class tickets*" (Tr. 169; initial brief of complainant, p. 46).

He further states: "I do not know how many colored people apply for Pullman tickets in Hot Springs for Chicago and are refused" (Tr. 169; initial brief of complainant, p. 46).

He further states: "All of the colored people who ride on my train *must sit in the Jim Crow car no matter what kind of a ticket they have.*"

Because the Supreme Court of the United States has held that such discrimination and prejudice is unjust and undue and violates the constitutional rights of the individual interstate passenger. McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U. S. 151, 161-162.

Because the undisputed evidence shows that it would be an idle gesture for a colored person holding a first-class [fol. 572] ticket which called for an interstate journey to apply for first-class accommodations in the Pullman car or observation-parlor car.

Because the uncontradicted testimony shows that colored persons holding first-class tickets and traveling on an interstate journey are refused all first-class accommodations,

although white persons holding similar tickets and traveling on identical interstate journeys are provided with all first-class accommodations, including the Pullman car and the observation-parlor cars.

Because it is a matter of common knowledge that the Rock Island Railroad and other railroads operating in interstate commerce in the southern part of the United States openly and flagrantly violate the constitutional rights of colored persons holding first-class tickets and traveling in interstate journeys and that such violation is a discrimination which is unjust, undue, and unlawful and would not, under any circumstances, be tolerated by members of any other race.

VIII

The complainant excepts to the final sentence of the proposed report of the Examiner, page 9, which is as follows:

"The complaint should be dismissed."

(a) Because it is admitted that the complaint charges unjust, undue, unreasonable and unlawful discrimination.

[fol. 573] (b) Because the undisputed and uncontradicted testimony of each and every witness, both for the complainant and for the Rock Island Railroad substantiated the charges contained in the complaint, and moreover clearly shows that for more than thirty-two years this discrimination has existed and continues to exist to the present day, and further shows that unless this Commission enters an order in accordance with the prayer of the complaint of the petitioner and the initial brief of the complainant, this unlawful and nefarious discrimination against persons of color paying first-class fares will continue.

[fol. 574] ARGUMENT IN SUPPORT OF EXCEPTIONS

I

Error in denying motion to strike answer of Rock Island.

Page 3, paragraph 2, the Examiner finds that Rule IV, (d) (e), of the rules of practice before the Commission were violated by the answer of the Rock Island in failing to completely advise the parties and the Commission of the nature of the defense; in failing to specifically admit or deny the

facts alleged in the complaint; in merely denying that the alleged discrimination is unjust under Section 2 of the Act, and that the alleged preference and prejudice was undue and unreasonable under Section 3 of the Act, and failed to state fully the grounds relied upon in making such denial.

Whether the Commission will permit the rules promulgated by it to be ignored or disregarded we believe to be a question for decision by the Commission. No argument is as strong as the mere reading of the complaint and the answer, to show that the motion of the complainant to strike the answer should have been sustained (Tr. 5-6).

No question is raised that the motion to strike the answer was not properly made before the hearing. The require-[fol. 575] ments of the Rule are best obtained from the reading of the rule itself. We believe that the Rock Island should not have been permitted to have openly and flagrantly violated the rule of this Commission and that this Commission will sustain its own rule.

II

Discrimination and segregation are not accepted by the complainant

We regret very much that the Examiner made a finding that "For the purposes of this proceeding the complainant accepts segregation under the Arkansas statute." This is not true and the complainant does not accept segregation under the Arkansas statute nor any other statute. Discrimination and segregation are abominable and we do not believe any fair minded American citizen can honestly place the stamp of approval upon the diabolical system.

It is only necessary to state that the mere fact that if any member of this Commission was placed in a similar situation he would protest the unjust and un-American system of segregation and discrimination of American citizens solely by reason of race, color or creed. The Arkansas statute is not applicable to interstate commerce and is limited to intrastate commerce only. This has been decided by the United States Supreme Court, so that the question can no longer be considered an open one and in McCabe v. [fol. 576] Atchison, Topeka & Santa Fe Ry. Co., 235 U. S. 151, at p. 160 the doctrine is again stated:

"That the Act, in the absence of a different construction by the state court, must be construed as applying to trans-

portation exclusively intrastate and hence did not contravene the commerce clause of the Federal Constitution. Louisville, etc., Ry v. Mississippi, 133 U. S. 587, 590; Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, 391; Chiles v. Chesapeake & Ohio Ry., 218 U. S. 71."

The Examiner (p. 8, par. 3) finds that the complainant was an interstate passenger and states:

"There was no break in complainant's journey at the Tennessee-Arkansas state line. He was engaged in *through interstate travel* from Chicago to Hot Springs."

We do not believe argument is necessary to emphasize the law as the same is so well stated by the United States Supreme Court as to admit of no controversy about the same.

In McCabe v. Atchison, Topeka & Santa Fe Ry. Co., supra, the contention of the complainant is again sustained and the Supreme Court, at page 161, states:

"* * * If facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of state law, a facility or convenience in the course of his [fol. 577] journey which, under substantially the same circumstances is furnished to another traveler, *he may properly complain that his constitutional privileges has been invaded.*"

A mere reading of the complaint and the uncontradicted testimony of the conductor, Albert W. Jones, who was a witness for the Rock Island, clearly establishes unjust, undue, unlawful and unreasonable discrimination.

We believe it will be useless to repeat the testimony contained in the transcript of record and abstract of evidence of this witness because his experience of 32 years entitles his testimony to some weight. We will only refer to his testimony to say that the unjust discrimination and prejudice should be removed. (Initial brief of complainant, pp. 40-48.)

An interstate passenger, whether colored or white, paying a first-class fare in entitled to first-class accommodations. This is axiomatic and we do not believe that there are any authorities in the United States holding to the con-

trary. The authorities cited in the initial brief of the complainant fully cover the principle of law governing this case and we do not believe any good purpose will be served to again reiterate the same. The complainant was entitled to substantial equality of treatment of persons traveling in interstate commerce, and having paid first-class fares. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., supra. It is conceded that first-class accommodations in the Pullman [fol. 578] sleeping car, observation-parlor car and dining car were furnished white passengers traveling in interstate commerce paying the identical first-class fare which had been paid by the complainant, and the denial and refusal of the Rock Island to equal accommodations and treatment of the complainant violated his constitutional rights and was unjust, undue, unlawful discrimination and preference. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., supra, pages 161, 162, and violated the Interstate Commerce Act and the 14th Amendment of the United States Constitution which guarantees the equal protection of the laws.

III

The furnishing of equal facilities and accommodations as required by law does not necessitate the furnishing of extra cars.

It is not claimed that "three extra cars must be provided for colored passengers paying first-class fares, plus the additional charges provided by tariff for seat space, but it is contended that if a common carrier engaged in interstate commerce provides the accommodations and facilities of a Pullman sleeper, dining car, and observation-parlor car for white passengers paying first-class fare plus the additional charges provided by tariff for seat space, then the law requires similar accommodations for colored passengers paying first-class fares plus the additional charges provided by tariff for seat space. Whether this requirement of the [fol. 579] law is by extra cars or by a partition in the cars now being furnished is to be determined by the common carrier but if such accommodations are furnished to any interstate passengers paying first-class fares, then similar accommodations must be furnished to all interstate passengers paying first-class fares who apply for such accommodations. Common decency requires of a common carrier that sells a first-class ticket to an interstate passenger that

it furnish to such passenger the kind and class of accommodations paid for.

The proposed report of the examiner (p. 7, par. 2) makes the following finding: "The present colored coach takes care of colored second class passengers *but there is no Pullman, dining or observation-parlor car for colored first-class pasengers.*" This finding is in accord with the allegations of the complaint and the uncontradicted testimony and is an admission that the law is being openly violated by this unjust, undue, unlawful and illegal discrimination and preference. The U. S. Supreme Court, in McCabe v. Atchison, Topeka & Santa Fe, supra, at pages 161, 162, holds that this failure to provide these accommodations for all first-class passengers is a violation of the equal protection of the laws as guaranteed by the 14th Amendment. In view of the allegations of the complaint, the undisputed testimony contained in the record, and the finding of the Examiner that only second-class accommodations are furnished for [fol. 580] colored passengers paying first-class fares, we are somewhat at a loss to reconcile the recommendation of the Examiner that the complainant be dismissed as to the Rock Island, and that the discrimination against colored interstate passengers paying first-class fares is not unjust and undue discrimination.

IV

First-class passenger entitled to first-class accommodations.

The Examiner states (p. 8, par. 2) "That a first-class ticket was furnished and charged for because complainant wanted it, * * *"

Every American citizen financially able to travel first-class has the right to pay for first-class transportation and receive first-class accommodations and facilities throughout his journey. This Commission has held in Edwards v. Nash., Chat. & St. Louis Ry. Co., 12 I. C. C. R. 247-249 that:

"If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations be provided for colored passengers of the same class. The principle that must govern is, that carriers must serve equally well all passengers, whether white or colored, *paying the same fare.* Failure to do this is discrimination and subjects the

passenger to undue and unreasonable prejudice and disadvantage."

[fol. 581] The complainant had a right to request, pay for, and receive a first-class ticket and first-class accommodations on his interstate journey.

The Examiner further states (p. 8, par. 2): "* * * and after it developed that the first-class accommodations west of Memphis were all taken by other passengers, defendants offered to refund the difference."

There is no evidence that the first-class accommodations were all taken but, on the contrary, it is uncontradicted and undenied that there were sufficient unoccupied sections in the Pullman sleeping car to have accommodated the complainant. In addition to the testimony of each of the witnesses that sufficient unoccupied space in the first-class accommodations were available, there was a stipulation (Tr. 49; initial brief of complainant, p. 32) that at the time the complainant was ejected from the Pullman car by the train conductor there were vacant and unoccupied seats in the Pullman car. The porter informed the complainant that he had plenty of space in the other car (initial brief of complainant, p. 20; Tr. 15-16). The testimony of the complainant (initial brief 23-24; Tr. 23-24) reads as follows:

"When the porter returned I requested that he talk with the train conductor and see if arrangements could not be made to permit me to ride in the smoking room of the Pullman car in which I was riding. There was nobody occupying the smoking room of the Pullman car. There were at least four or five sections in this Pullman car in which I was riding which were unoccupied."

[fol. 582] The testimony of Albert W. Jones, conductor for the Rock Island and a witness called by the Rock Island (initial brief p. 44, Tr. 151):

"There was plenty of room in the observation car on that day" (initial brief of complainant, p. 45, Tr. 154).

"Congressman Mitchell was sitting in Sec. 3 of the Pullman Car alone. I do not know if any one occupied Sec. 3 from Memphis to Hot Springs on April 21, but *whether the space had been sold or not I would not have sold a seat in Sec. 3 or any other space in the Pullman car to Congressman Mitchell because he was a colored person.*"

To further show that the discrimination against the complainant was not because all of the first-class accommodations had been taken by other passengers is the statement of the conductor, Albert W. Jones (initial brief of complainant, p. 23, Tr. 23): "It don't make a damn bit of difference who you are, as long as you are a 'nigger' you can't ride in this car."

We do not believe it is necessary to continue to point out the failure of the evidence to sustain the finding or statement of the Examiner that the first-class accommodations were all taken by other passengers.

[fol. 583] V

Only second-class accommodations are furnished by the Rock Island to colored passengers traveling in interstate Commerce and paying first-class fares.

The finding or statement of the Examiner, page 9, paragraph 3 of the proposed report: "The present colored coach meets the requirements of the law" is unsupported by any evidence but on the contrary is contradicted by each and every witness who testified at the hearing, in particular the witnesses for the Rock Island. We will briefly set out a few excerpts from the testimony of the witness, Albert W. Jones, 32 years a railroad conductor and employed by the Rock Island on this identical train in question (Initial brief of complainant, p. 44; Tr. 149).

"The Rock Island Railroad Company has no such accommodations for Negroes, although the Negroes may have first-class tickets on the Rock Island Railway or 'three-cent per mile' tickets. During the 32 years I have worked over there in Arkansas for the Rock Island Railroad Company it has never had any first-class accommodations for Negroes and haven't any first-class accommodations in the sleeping cars for Negroes now."

The Rock Island Railroad Company does not at this time have any first-class accommodations for colored passengers paying the three-cent-a-mile fare, permit them to use the observation car which belongs to the Rock Island, nor can [fol. 584] they use the dining car nor sleeping car, although they may hold first-class tickets.

On page 45 of the initial brief of the complainant the witness states:

"The accommodations furnished to Negro passengers in the jim crow car where Congressman Mitchell was compelled to ride are not equal to the accommodations furnished in the observation car by the Rock Island Railway to white passengers holding first-class tickets."

The same witness at page 46, initial brief of complainant, states:

"He showed me his ticket and offered to pay for the accommodations. *But I told him he was a colored man and could not ride in those first-class accommodations.*"

This same witness for the Rock Island at page 47, initial brief for complainant, states: "All of the colored people who ride on my train must sit in the jim crow car, no matter what kind of ticket they have."

The Examiner himself, on page 7, paragraph 2 of the proposed report, states: "The present colored coach takes care of colored second-class passengers, but there is no Pullman, dining or observation-parlor car for colored first-class passengers."

We believe this statement, alone, is sufficient to show that there are no first-class accommodations for colored passengers paying first-class fares and making an interstate jour-
[fol. 585] ney. This is clearly a violation of the rights of the colored passengers paying first-class fares and traveling in interstate commerce. McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U. S. 151, 160. We have fully covered the law sustaining the contention of the complainant in the initial brief of the complainant under points and authorities (p. 50, 56). A restatement of the provisions of the law we believe to be unnecessary.

The Examiner states, on page 9, paragraph 3 of the proposed report:

"As there is comparatively little colored traffic and not likely to be such demand for Pullman, dining and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars, the discrimination and prejudice is plainly not unjust nor undue."

The U. S. Supreme Court in McCabe v. Atchison, Topeka & Santa Fe Ry. Co., supra, holds that discrimination on account of the volume of traffic is without merit. In the McCabe case the separate coach law of Oklahoma contains al-

most identical provisions as the Arkansas separate coach law and the attorney general of the state contended that the volume of traffic did not warrant the furnishing of first-class accommodations to colored passengers paying first-class fares and traveling in interstate commerce. Mr. Justice Hughes, delivering the opinion of the U. S. Supreme Court, beginning at pages 160, 162, states:

[fol. 586] "With the third[1] relating to Sec. 7 of the statute we are unable to agree. It is not the question that the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and *provide no similar accommodations for Negroes.* The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the attorney general of the state, in the brief, filed by him in support of the law, urges that 'the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or, sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not, by law, compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility.' And in the brief of counsel for the appellees, it is stated that the members of the legislature 'were undoubtedly familiar with the character and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel' in that state.

---

[1] 3. That the provision of Sec. 7 above quoted, relating to sleeping cars, dining cars and chair cars did not offend against the 14th Amendment as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 151, 160.

[fol. 587] *This argument with respect to volume of traffic seems to us to be without merit.* It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, *substantial equality of treatment of persons traveling under like conditions cannot be refused.* It is the individual who is entitled to the equal protection of the laws and if he is denied by a common carrier, acting in the matter under the authority of a state law, the facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler he may properly complain that his constitutional privilege has been invaded." (Italics ours.)

We do not believe any argument made by the complainant will be as forceful as the decision of the United States Supreme Court and therefore the question of the amount of colored traffic has no bearing upon the discrimination practiced against the complainant who was a first-class passenger having paid a first-class fare and entitled to first-class facilities and accommodations in his interstate journey from Chicago, Illinois, to Hot Springs, Arkansas.

The recommendation of the Examiner is "that the complaint be dismissed." In view of the undisputed evidence clearly showing a course of unjust, undue, and unlawful and illegal discrimination and preference over a period of [fol. 588] thirty-two years against colored passengers paying first-class fares and traveling in interstate commerce, we are unable to reconcile the recommendation of the Examiner with the evidence contained in the record and the law as enunciated by this Commission and the United States. In so far as the Pullman Company and Illinois Central Railway Company are concerned, it appears that they are not guilty of discrimination in this particular case but the evidence clearly shows that the Rock Island is guilty of the charges contained in the complaint and the testimony of the conductor, Albert W. Jones, alone, is sufficient to show that not only has this unlawful discrimination existed for thirty-two years but that on the day of the hearing the

undue, unjust and illegal discrimination was in existence. The cases cited in points and authorities of the initial brief of the complainant in connection with McCabe v. Atchison, Topeka & Santa Fe, supra, we believe to be sufficient to sustain the exceptions of the complainant to the proposed report of the Examiner and to warrant this Commission in granting the relief prayed for in the complaint of the petitioner and the "Request for Special Findings" (initial brief of complainant, pp. 56-59).

VI

The discrimination and prejudice is unjust and undue.

The Examiner, in his proposed report (p. 5, par. 2) describes the colored coach or Jim Crow car, and his descrip-
[fol. 589] tion of this coach, which is the only accommodation furnished colored passengers journeying in interstate commerce, whether they pay first or second-class fare, is almost identical with the description of the Jim Crow cars in Councill v. Western & Atlantic Ry. Co., 1 I. C. C. R. 339; Heard v. Georgia Railway Co., 1 I. C. C. R. 428; Heard v. Georgia Railway Co., 3 I. C. C. R. 111, which Jim Crow accommodations were condemned in the preceding cited cases by this Commission. The Examiner finds in said paragraph that the colored coach (1) was next to the baggage car; (2) was an old combination affair; (3) was divided by partitions into three main parts, one end for colored smokers, one end for white smokers, and in the middle, between the two smoking compartments, surrounded by the smoke and fumes, is the only accommodation provided for colored female passengers; (4) that the car was poorly ventilated and not air conditioned; (5) that in the women's section there was only one toilet equipped with flushing facilities and this was for the exclusive use of colored women; (6) that the car was without washbasins, soap, towels, or running water, except in the women's section.

Such condition was held, in Edwards v. Nash. Chat. & St. Louis Ry., 12 I. C. C. R. 247-249, by this Commission to be unjust discrimination and subjected the colored passengers to undue and unreasonable prejudice and disadvantage.

Has the Commission changed its ruling and can any fair minded person honestly state that the above described ac-
[fol. 590] commodations, which are the only accommoda-

tions furnished colored passengers paying first-class fares, are substantially equal to the accommodations and facilities furnished to white passengers paying first-class fares in the Pullman cars, dining cars, and observation-parlor cars? We think not and we submit, to hold that such accommodations furnished to colored interstate passengers paying first-class fares to be equal to the first-class accommodations furnished white interstate passengers paying first-class fares would prostitute sound reasoning.

The uncontradicted testimony of the complainant that the toilet facilities furnished colored men traveling as interstate passengers on the Rock Island Train No. 45 and who had paid first-class fares, was filthy and foul-smelling is corroborated by the fact that the toilets contained no water nor flushing facilities and had been used during the journey.

Page 6, paragraph 2 of the proposed report of the Examiner finds that the uncontradicted testimony of witnesses for the complainant who had traveled from Memphis to Hot Springs over the Rock Island showed that for many years there was only a single common toilet for colored men and women holding first-class tickets and traveling as interstate passengers while much more desirable accommodations were provided for white passengers traveling in coaches on the same train. The Examiner does, however, state this flagrant and continued undue and unjust discrim- [fol. 591] ination should be condemned.

VII

Volume of traffic is no basis for discrimination in accommodations and facilities in interstate commerce

The Examiner, on page 7, paragraph 2 of the proposed report, attempts to justify the unjust and undue discrimination and preference practiced against colored passengers paying first-class fares and traveling in interstate commerce by the small volume of traffic, and states that "There is hardly ever a demand from a colored passenger for Pullman accommodations." In view of the testimony of the conductor, Albert W. Jones, that he would not permit any colored person to ride in the Pullman car and observation car, although they held first-class tickets (Tr. 171, initial

brief of complainant, p. 47); that during his thirty-two years as a conductor on the Rock Island he had continuously refused to sell first-class accommodations in sleeping cars and observation cars to colored people; the uncontradicted testimony of the complainant that although he held a first-class ticket entitling him to the first-class accommodations furnished in the Pullman car, dining car, and observation-parlor car, he was denied the right to exercise the same privileges exercised by white persons traveling in interstate commerce on the same train and paying the same fare paid by the complainant; that the Rock Island ticket agent in Hot Springs had refused to sell him first-[fol. 592] class accommodations in the Pullman car from Hot Springs to Chicago (initial brief of complainant, p. 29); the uncontradicted testimony of the witness, Edward H. Carey that he had been refused first-class accommodations solely because he was a colored person (initial brief of complainant, p. 36); the uncontradicted testimony of William Harrison that he had been refused first-class accommodations by the Rock Island Railroad solely on account of his being a colored man (initial brief of complainant, p. 37); the uncontradicted testimony of the witness John J. Pullen (initial brief of complainant, p. 39) that he had paid first-class fare and was compelled to accept second-class accommodations by the train conductor, and the continued refusal of the Rock Island Railway Company to furnish first-class accommodations for colored passengers holding first-class tickets and traveling on interstate journeys, we do not believe the Commission will disregard the fundamental principle of law that "the law will not require a person to do a useless thing." It is *is* clear that a demand by a colored passenger holding a first-class ticket and traveling in interstate commerce, for Pullman accommodations, dining car service, observation-parlor car accommodations and facilities, and all other first-class service furnished by the Rock Island on Train 45, would have been useless.

The case of McCabe v. Atchison, Topeka & Santa Fe Ry. Co., supra, we believe settles the question that the volume [fol. 593] of traffic does not justify discrimination in the furnishing of first-class accommodations to all passengers holding first-class tickets and traveling in interstate commerce.

VIII

The complaint should not be dismissed as to the Rock Island

It is conceded that the complaint filed in this case sufficiently sets forth facts charging unjust, undue, unreasonable and unlawful discrimination and preferences as well as violations of the Interstate Commerce Act.

The recommendation that the complaint be dismissed as to the Rock Island, subjects the complainant and all other colored persons paying first-class fares and traveling as interstate passengers on the Rock Island, to actual and continued illegal injury and unless an order is entered by the Commission against the Rock Island to desist from the undue, unlawful and illegal discrimination and preference as shown by the uncontradicted evidence in the record, the complainant and all other such colored persons will continue to be subjected to illegal injury, Edward Hines Yellow Pine Trustees, et al. v. U. S., et al., 263 U. S. 143; 44 S. Ct. 72, 73.

The complainant having alleged in his complaint against the Rock Island and having established the allegations contained in his complaint showing conclusively the unjust discrimination practiced by the Rock Island continuously for [fol. 594] the past thirty-two years, is compelled to seek redress by proceeding before the Interstate Commerce Commission. Edward Hines Yellow Pine Trustees, et al. v. U. S., et al., supra.

In McCabe v. Atchison, Topeka and Santa Fe Railway Company, 186 Fed. 966, the dissenting opinion of Sanborn, Circuit Judge, fully discusses various phases of discrimination against citizens of color and the rights of colored citizens to enjoy privileges and immunities guaranteed by the 14th Amendment equally with all other citizens.

It further discusses and illustrates the prohibition of the clause contained in the 14th Amendment of the Constitution of the United States which prohibits any state to deny to any person within its jurisdiction the equal protection of the laws.

The views expressed by Judge Sanborn concerning the right of every citizen white or black to equal accommodations and facilities while traveling as an interstate passenger were fully sustained in McCabe v. Atchison and Topeka Santa Fe Railway Company, 235 U. S. 151 at pp. 161-162.

It is to be noted that the identical defect pointed out by

the United States Supreme Court in McCabe v. Atchison and Santa Fe Railway, supra, does not exist in the case at bar because the complainant in the case at bar did travel over the Rock Island lines; that he requested first-class ac- [fol. 595] commodations and facilities during his continuous journeying as an interstate passenger, being a first-class fare from Chicago to Hot Springs; that this request that he be furnished with sleeping car, dining car and observation car accommodations during said journeying was made of the Rock Island and denied to him; that such first-class accommodations were furnished to other white passengers paying the same first-class fare on the same journey with the complainant; that the complainant offered to pay the customary charge in addition to the first class fare which he had paid for the accommodations of the sleeping car, dining car, and observation car privileges, and that these first-class accommodations were refused him, although, they were furnished to other white passengers who were traveling under like circumstances as the complainant.

It is further alleged in the complaint and proven by the testimony of witnesses for the complainant of the Rock Island that the complainant was compelled to accept second-class accommodations from the Rock Island, although he had paid a first-class fare and was on a continuous journey as an inter-state passenger and was entitled to the enjoyment of equal accommodations of the sleeping car, dining car and observation parlor car which were furnished to other white passengers traveling in the identical situation as the complainant.

We believe that a mere reading of the evidence in the case at bar will clearly demonstrate that the proposed report of [fol. 596] the examiner which recommends that the complaint against the Rock Island be dismissed is contrary to the undisputed and uncontradicted evidence in the record and his conclusions and recommendations are indefensible. They should be stricken from the report.

The proposed report of the examiner is dated May 5, 1938. A copy of the same was served upon the attorney for the complainant in Chicago by mail, May 7, 1938. Rule XIV, paragraph 4 of the Rules of practice provides that 20 days after service of the proposed report the complainant is entitled to file Exceptions. A stamp on the proposed report limited the filing of the Exceptions to May 25, 1938,

which is only 18 days after the service of the proposed report.

[fol. 597] Conclusion

It is clear that the examiner's recommendation of dismissal is not based upon the uncontradicted and undisputed facts contained in the record and is contrary to the law. His conclusion should be rejected and an order entered in accordance with the prayer of the complainant, "Request for Specific Findings Contained in the Initial Brief of the Complainant (P. 56-59)."

Respectfully submitted, Richard E. Westbrooks, 3000 S. State Street, Chicago, Illinois. Arthur W. Mitchell, Pro Se, 417 E. 47th Street, Chicago, Illinois, Attorneys for Complainant.

May 24, 1938.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each party of record.

Dated at Chicago, Illinois, this 24th day of May, 1938.

Richard E. Westbrooks, Of Counsel.

[fol. 598] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 599] United States Supreme Court

Statement of Points Upon Which Appellant Intends to Rely and of the Part of the Record Necessary for Consideration Thereof—Filed December 2, 1940.

To: Charles Elmore Cropley, Clerk:

Pursuant to the provisions of General Rule 13, Paragraph 9 thereof, the appellant files this, his designation of points upon which he intends to rely and of the parts of the record he regards necessary for the consideration thereof:

1. The points upon which the appellant will rely are as follows:

The District Court for the Northern District of Illinois, Eastern Division erred in making the final order and decree in this cause, and in dismissing the petition herein for lack of jurisdiction at the costs of the plaintiff in the following respects:

(1) It erred in finding that the Commission's findings of fact were all supported by substantial evidence.

(2) It erred in finding that the findings of the Commission are not erroneous.

(3) It erred in finding that the order of the Commission [fol. 600] is not contrary to law.

(4) It erred in finding that the order of the Commission contravenes no provisions of the Federal Constitution.

(5) It erred in finding that the order of the Commission is supported by findings.

(6) It erred in finding that the court was without jurisdiction to grant the relief sought in the complaint or any part thereof and that the complaint should be dismissed.

(7) It erred in dismissing the cause for lack of jurisdiction at the costs of the complainant.

(8) It erred in failing to find, as it should have done, that the plaintiff was an interstate passenger on the Rock Island Railroad, holding a first-class round trip ticket for which he had paid a first-class fare from Chicago, Illinois, to Hot Springs, Arkansas.

(9) It erred in failing to find, as it should have done, that the plaintiff as such first-class passenger, making a continuous interstate journey and travelling in interstate Commerce, was entitled to equal first-class accommodations and comforts identical with the first-class accommodations and comforts furnished all other white passengers holding first-class tickets and travelling in interstate commerce.

(10) It erred in failing to find, as it should have done, that it was the lawful duty of the Rock Island to furnish to the plaintiff, as a first-class interstate passenger, such equal accommodations and comforts as were furnished to first-class white passengers travelling on the same train as interstate passengers.

(11) It erred in failing to find, as it should have done, that the Rock Island wilfully failed to furnish to the plaintiff such equal accommodations and comforts as was its lawful duty to so furnish, but on the contrary compelled the

plaintiff to occupy, during a part of his interstate journey, second-class accommodations.

(12) It erred in failing to find, as it should have done, that such conduct on the part of the Rock Island was in violation of the Interstate Commerce Act.

(13) It erred in failing to find, as it should have done, that the Rock Island received from the plaintiff a first-class fare but compelled him to occupy second-class accommodations in violation of the Interstate Commerce Act.

[fol. 601] (14) It erred in failing to find, as it should have done, that the conductor of the Rock Island, in furnishing first-class accommodations to all white passengers holding first-class tickets and travelling as interstate passengers, and refusing to furnish the same to the plaintiff who held a first-class ticket and was travelling as an interstate passenger, was unduly and unreasonably prejudicial to him and was unduly and unreasonably preferential to the white passengers to the disadvantage of the plaintiff and violated the Interstate Commerce Act.

(15) It erred in failing to find, as it should have done, that the Rock Island, in charging and receiving a greater compensation for services rendered in transporting the plaintiff as a first-class interstate passenger, than was charged and collected from other persons for doing for them a like and contemporaneous service, did unjustly discriminate against the plaintiff in violation of the Interstate Commerce Act.

(16) It erred in failing to find, as it should have done, that the conduct of the Rock Island, in receiving a charge from the plaintiff and contracting to furnish first-class accommodations and comforts during the entire interstate trip of the plaintiff from Chicago, Illinois, to Hot Springs, Arkansas, and in failing and in refusing to furnish such first-class accommodations, although such first-class accommodations were available, was unjust, unreasonable, unlawful and in violation of the Interstate Commerce Act.

(17) It erred in failing to find, as it should have done, that the conductor of the Rock Island, in having practiced unjust discrimination against all colored persons travelling in interstate commerce for the past 32 years has caused, is causing and will cause undue and unreasonable advantage to white persons, and undue and unreasonable prejudice to the plaintiff and all colored persons travelling in interstate

commerce and is in violation of the Interstate Commerce Act.

(18) It erred in failing to find as it should have done, that the conduct of the Rock Island towards the plaintiff as above set forth, is in violation of the 14th Amendment of the United States Constitution in denying to the plaintiff the equal protection of the law.

(19) It erred in failing to find, as it should have done, that the conduct of the Rock Island towards the plaintiff as above set forth, is in violation of the statutes and laws enacted by the Congress of the United States, known as the Enforcement Act or Civil Rights Act.

[fol. 602] (20) It erred in failing to find, as it should have done, that it is a lawful duty which the Rock Island owes to white and colored passengers on this line, in interstate travel, to make them equal in comforts, accommodations, and equipments, without discrimination where the same price is charged and paid for.

(21) It erred in failing to find, as it should have done, that it is the lawful duty which the Rock Island owes to the travelling public over its line engaged in interstate travel, that its train officers should refrain from practices against all such passengers without regard to race, color or sex, which result in und-e prejudice and disadvantage.

(22) It erred in failing to find, as it should have done, that there is no equality of service, when the money of white first-class interstate passengers purchase- luxurious accommodations, and comforts and the same amount of money purchases for the colored first-class interstate passengers inferior quarters on the same interstate journey.

(23) It erred in failing to find, as it should — done, that common carriers are bound to provide for colored interstate passengers, holding first-class tickets, accommodations and comforts precisely equal in all respects to those provided for white interstate passengers holding a similar ticket.

(24) It erred in failing to find, as it should have done, that common carriers are bound to provide such first-class accommodations and comforts to an interstate passenger without regard to race or color, as the first class interstate passenger has contracted and paid for.

(25) It erred in failing to find, as it should have done, that the separate coach law of the State of Arkansas, has no

application to interstate passengers making a journey in interstate commerce.

(26) It erred in failing to find, as it should have done, that the plaintiff, as a native born citizen of the United States, was entitled to all privileges and immunities of citizens in the several states, and a denial to the plaintiff solely on account of his race by the Rock Island, under a claim of custom or local State law, while all other citizens under like conditions are granted the same privilege and immunity, is in violation of the Constitution of the United States.

(27) It erred in failing to find, as it should have done that the order entered by the Interstate Commerce Commission dismis-ing the proceedings filed by the plaintiff before the Interstate Commerce Commission and the findings upon [fol. 603] which said order is based, are arbitrary and unjust.

(28) It erred in failing to find, as it should have done, that said order and findings are contrary to the evidence of record.

(29) It erred in failing to find, as it should have done, that said order and findings are without support of any substantial evidence in the record.

(30) It erred in failing to find, as it should have done, that said order and findings were without support of any evidence in the record before the said Commission in the proceedings in which they were made.

(31) It erred in failing to find, as it should have done, that said order and findings are against the indisputable character of the manifest weight of the evidence.

(32) It erred in failing to find, as it should have done, that in making the order and findings the Commission disregarded the undisputed and uncontradicted evidence contained in the record.

(33) It erred in failing to find, as it should have done that there are no findings of fact to support the order of the Commission.

(34) It erred in failing to find, as it should have done, that the Commission proceeded under erroneous constructions of law and misapprehensions in respect of its powers.

(35) It erred in failing to find, as it should have done, that said order and findings are contrary to the laws of the United States of America.

(36) It erred in failing to find, as it should have done, that said order and findings conflict with the former decisions of the Interstate Commerce Commission in cases involving the identical situation as the case at bar.

(37) It erred in failing to find, as it should have done, that said orders and findings are contrary to any conflict with the United States Constitution and all Amendments thereto.

(38) It erred in failing to find, as it should have done, that the order and findings of the Commission conflicts with, and is contrary to the decisions of the Supreme Court of the United States, the United States Circuit Courts of Appeal and the United States District Courts, in cases involving the identical situation as shown by the undisputed and uncontradicted evidence appearing in the record.

[fol. 604] (39) It erred in failing to find, as it should have done, that said orders and findings are contrary to and conflict with the Enforcement Act or Civil Rights Act of the United States.

(40) It erred in failing to find, as it should have done, that said orders and findings are a denial of the plaintiff of the due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

(41) It erred in failing to find, as it should have done, that said orders and findings are a denial of the equal protection of the laws to the plaintiff as guaranteed by the Fourteenth Amendment of the United States Constitution.

(42) That the order of the Interstate Commerce Commission and the judgment of the United — District Court are contrary to the basic principles upon which this Government was founded, and judicially approves unjust discrimination against a native born American Citizen, solely on account of his race and color and said order and judgment is unjust and un-American.

(Where the Name "Rock Island" is Used in the Above Designated Points, the Defendants, Frank O. Lowden, James B. Gorman and Joseph B. Felming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a Corporation, Are Designated in the Foregoing Points Upon Which the Appellant Intends to Rely as Rock Island.)

2. The portions of the record which he thinks necessary for the consideration thereof are as follows:

1. Petition of Arthur W. Mitchell, plaintiff in the United States District Court.

2. Answer of the United States of America.

3. Separate Answer of Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, a corporation.

4. Separate answer of Illinois Central Railroad Company, a corporation.

5. Answer of Interstate Commerce Commission.

6. Separate Answer of the Pullman Company, a corporation, to the Petition of Arthur W. Mitchell.

7. Order of March 23, 1940, setting cause for May 27, 1940, before three judge court.

[fol. 605] 8. Proceedings of May 27, 1940, showing trial of cause.

9. Findings of fact, conclusions of law and final order and decree of three judge court entered June 27, 1940.

10. Notice of Appeal, Petition for Appeal, Assignment of Errors and Proof of Service. Filed August 23, 1940.

11. Order granting appeal to United States Supreme Court and fixing appeal bond entered August 23, 1940.

12. Order approving appeal bond entered August 24, 1940.

13. Appellant's Praecipe for Record for use in United States Supreme Court on appeal and proof of service filed September 3, 1940.

14. Appellee's Praecipe for Record. Filed, September 9, 1940.

15. Jurisdictional Statement and Affidavit of Service. Filed September 11, 1940.

16. Citation and Proof of Service, filed September 17, 1940.

17. Notice to Attorney General of the State of Illinois and Proof of Service, filed September 20, 1940.

18. Order extending time to settle Narrative Statement of Evidence for docketing the cause in the Supreme Court of the United States and to complete the Transcript of Record for certification by the Clerk of the United States District Court, to and including November 21, 1940. Filed, September 21, 1940.

19. Order directing Clerk of District Court to include in the Transcript of Record, for use on appeal to the Supreme Court of the United States in this cause, all original exhibits introduced on the hearing in the United States District Court and that Plaintiff Exhibit No. 1, (a), (b), (c), (d), (e), and Defendant's Exhibit No. 1, stand in lieu of a Narrative Statement of the Evidence and be so certified to the Supreme Court of the United States by Clerk of this Court, entered November 14, 1940.

20. Order directing Clerk of District Court to send as an original exhibit to the Clerk of the Supreme Court of the United States and to include as a part of the record on this appeal, a transcript of oral argument made May 27, 1940, by counsel for the respective parties entered November 14, 1940.

21. Notice of Motion, Suggestions in Support of Motion and Proof of Service, filed November 14, 1940.

22. Plaintiff's Exhibit No. 1 admitted on the hearing in the United States District Court in this cause May 27, 1940, [fol. 606] which consists of the following:

a. Complaint filed September 2, 1937, before the Interstate Commerce Commission and appearing in the Petition filed in this cause April 20, 1939 (p.p. 3-9 of the petition filed in the United States District Court in this cause).

b. Transcript of the stenographer's notes of the hearing held March 7, 1938, at Chicago, Illinois, before Examiner W. A. Disque, and all exhibits filed at said hearing, duly certified by the secretary of the Interstate Commerce Commission as provided by law.

c. Report proposed by William A. Disque, Examiner, filed May 5, 1938, with the Interstate Commerce Commission and appearing in the petition filed in this cause, April 20, 1939 (p.p. 12-21 of the Petition filed in this cause).

d. Report and order of the Interstate Commerce Commission filed and entered November 7, 1938, including all dissenting opinions filed with said report and appearing in the petition filed in this cause April 20, 1939 (p.p. 22-41 of the Petition filed in the United States District Court in this cause).

e. Order of the Commission entered March 6, 1939, denying the complainant's petition for rehearing and reargument and appearing in the petition filed in this cause April

20, 1939 (p.p. 41-42 of the Petition filed in the United States District Court in this cause).

23. Defendant, United States of America's, Exhibit No. 1:

a. A certified copy of the Exceptions filed with the Interstate Commerce Commission by complainant Arthur W. Mitchell to the Examiner's proposed report and the reply of the defendants to those Exceptions.

24. Certain exhibits attached to transcript of stenographer's notes before the Interstate Commerce Commission at the hearing on March 7, 1938, at Chicago, Illinois, Examiner W. A. Disque presiding as follows:

a. Exhibit No. 1, return of railroad ticket from Hot Springs, Arkansas to Chicago, Illinois, stamped April 20, 1937, #C-2649.

b. Exhibit No. 2, Pullman stub from Chicago, Illinois, to Memphis, Tennessee, Compartment C, Car 27, Ticket No. 951.

c. Table D, page 1, of Exhibit No. 3, from Illinois Central time table showing train #3 daily, the Louisiane leaving Chicago 6:05 P. M.—Memphis, Tennessee 8:30 A. M., there connecting with Rock Island train #45; Table No. 1, page 15, showing train #3; from page 5, showing equipment of [fol. 607] train #3; Table #33, page 47, showing Rock Island equipment of train #45, Memphis to Hot Springs.

d. From Exhibit #4, Rock Island time table January 1937, on Page 6, the equipment of through car train #45 of the Rock Island; page 12, the paragraph entitled Changing Class of Tickets; page 24, table #5, showing through train Nos. 45-51; page 32, paragraph concerning Changing Class of Tickets; page 33, showing sleeping car fares from Chicago to Hot Springs, Arkansas, including seat fares.

Respectfully submitted, Richard E. Westbrooks, and Arthur W. Mitchell, Pro Se, Attorneys for Appellant, 3000 South State Street, Chicago, Illinois.

Dated: December 1, 1940.

STATE OF ILLINOIS,
County of Cook, ss.:

Gladys E. Page, first being duly sworn, deposes and says that at the request of the attorneys for the appellant, she served the above and foregoing designation of points upon

which appellant intends to rely and of the part of the record necessary for consideration thereof upon the attorneys for all parties of record, by placing a copy of the same in a sealed envelope with the proper amount of postage attached to said envelope and addressed to each of the attorneys for the parties of record in this cause, and depositing each of the said envelopes in the United States Post Office, Chicago, Illinois, on this the 1st day of December, 1940.

Gladys E. Page, Affiant.

Subscribed and sworn to before me this 1st day of December, A. D. 1940. Richard E. Westbrooks, Notary Public. (Seal.)

[fol. 608] [File endorsement omitted.]

[Endorsed on cover:] Enter Richard E. Westbrooks. File No. 44,926, N. Illinois, D. C. U. S., Term No. 577. Arthur W. Mitchell, Appellant, vs. The United States of America, Interstate Commerce Commission, Frank O. Lowden, et al. Filed November 18, 1940. Term No. 577, O. T. 1940.

(1948)

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 18 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 577

ARTHUR W. MITCHELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

RICHARD E. WESTBROOKS,
ARTHUR W. MITCHELL,
Counsel for Appellant.

BLANK PAGE

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Date of the decree and application for appeal	2
Nature of the case	2
Grounds upon which it is contended the questions involved are substantial	2

Table of Cases Cited.

Atchison, Topeka & Santa Fe Railway Co. v. *United States,* 279 U. S. 768, 49 Sup. Ct. 494, 73 L. Ed. 947	11
Baltimore & Ohio Railroad Co. v. *United States,* 279 U. S. 781, 49 Sup. Ct. 492, 73 L. Ed. 954	11
Brown v. *Memphis & C. Ry. Co.,* 5 Fed. 499	15
Buchanan v. *Warley,* 245 U. S. 60, 38 Sup. Ct. 16	13, 14, 19
Councill v. *Western & Atlantic Railroad Co.,* 1 I. C. C. 339, 1 I. C. C. 638	14
Edwards v. *Nashville, Chattanooga & St. Louis Ry. Co.,* 12 I. C. C. 247	14
Gray v. *Cincinnati Ry. Co.,* 11 Fed. 683	16
Hall v. *De Cuir,* 95 U. S. 485, 24 L. Ed. 547	15
Hart v. *State of Maryland,* 100 Md. 595, 60 Atl. 457	15
Heard v. *Georgia Railroad Company,* 1 I. C. C. 428	14, 19
Houck v. *Southern Pacific Ry. Co.,* 38 Fed. 226	16
Huff v. *Norfolk & Southern Railway,* 88 S. E. 344, 171 N. C. 203	15
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company,* 227 U. S. 88	18
Logwood and Wife v. *Memphis & C. Ry.,* 37 Fed. 318	16
McCabe v. *Atchison, Topeka & Santa Fe Ry. Co.,* 235 U. S. 151, 59 L. Ed. 169, 35 Sup. Ct. 69	13, 14, 15
McGuinn v. *Forbes, et al.,* 37 Fed. 639	16

Page

Manufacturers Railway Company, et al. v. *U. S., et al.*, 246 U. S. 457 ..... 11, 18
Missouri, ex rel. Gaines v. *Canada, etc., et al.*, 305 U. S. 337 ..... 13, 14
Mitchell v. *C. R. I. & P. Ry. Co.*, 229 I. C. C. 703 .. 4, 5, 10, 20
Murphy v. *Western & A. Railroad Co.*, 23 Fed. 637 16
Rochester Telephone Co. v. *United States*, 307 U. S. 125 ..... 11, 17
Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664 19
Sue, The, 22 Fed. 843 16
United States v. *Maher*, 307 U. S. 148 11
Washington, B. & A. Electric R. Co. v. *Waller*, 289 Fed. 598 15

STATUTES CITED.

Constitution of the United States:
Article I, Sec. 8 15
Article IV 12
14th Amendment 6, 12
Interstate Commerce Act:
Section 1(5) 4, 13
Section 2 ..... 4, 13
Section 3(1) 4, 13
Section 13(4) 5, 13
Section 15(1) 13
Judicial Code, Section 210 (28 U. S. C. A. 47 and 47a) 1, 11
Separate Car Law of Arkansas 5
Urgent Deficiencies Act, 38 Stat. 219 28 U. S. C. A. 41(27) and (28) and Secs. 43-48 10
United States Code:
Title 3, Secs. 41 and 43 12
Title 49, Sec. 1, par. 2, Sec. 1 (par. 1), (Sec. 13, pars. 1, 3, 4 and Sec. 15(1) 14

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

In Equity No. 500

ARTHUR W. MITCHELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA, ET AL.

Defendants.

JURISDICTIONAL STATEMENTS.

Statement of basis on which plaintiff contends the Supreme Court of the United States has jurisdiction to review on appeal the decree appealed from, as required by Supreme Court Rule 12.

Pursuant to Supreme Court Rule 12, par. 1, Arthur W. Mitchell, the above plaintiff, files this, his statement particularly disclosing the basis on which said plaintiff contends that the Supreme Court has appellate jurisdiction to review on appeal the decree and final order appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is Section 210 of the Judicial Code, also known as Sections 47 and 47-a of Title 28 United States Code Annotated (Judicial Code and Judiciary).

II. The order and decree appealed from was entered on the 27th day of June, 1940.

III. The application for an appeal was presented, allowed and filed August 23, 1940.

IV. The appeal herein is from an order and decree of the District Court, in a civil case in equity, filed in the District Court to set aside, annul and vacate in whole an order of the Interstate Commerce Commission.

Nature of the Case.

On September 2, 1937, the plaintiff filed complaint with the Interstate Commerce Commission (hereinafter called the Commission), naming as defendants Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company (hereinafter called the Rock Island), Illinois Central Railway Company (hereinafter called the Illinois Central), and the Pullman Company, alleging that the defendants had violated the provisions of the Interstate Commerce Act, which violations related to certain actions of the defendants towards the plaintiff on a continuous interstate journey from Chicago, Illinois, to Hot Springs, Arkansas, while the plaintiff was traveling as a first class passenger in interstate commerce, holding a first class railroad ticket for which he had paid the regular first class fare (3 cents per mile) according to the established and published tariff, which tariff had been filed with the Commission as required by law.

The complaint, among other things, alleged, that the defendants were common carriers engaged in the transportation of goods and persons wholly by railroad, engaged in interstate commerce between Chicago, Illinois and points in the State of Arkansas and as such common carriers were subject to the provisions of the Interstate Commerce Act.

That said defendants, on April 20, 1937, made and received a charge for services rendered the plaintiff in connection with the transportation of the plaintiff from Chicago, Illinois, to Hot Springs, Arkansas, in that, the plaintiff did purchase a first class round-trip ticket to and from Hot Springs, Arkansas, over the defendant's lines and was received in Chicago, Illinois as a first class passenger and furnished with equal first class accommodations and facilities with all other interstate passengers paying the same rate of fare and engaged in the same interstate journey on the lines of the defendant. That before the plaintiff had completed his interstate journey and had reached a point of more than a hundred miles from Hot Springs, Arkansas, the defendants forcibly ejected the plaintiff from the first class accommodations and facilities, then being furnished and used by all other first class passengers who were white persons, and plaintiff was compelled to complete his journey in second class accommodations which were furnished for use by colored passengers and known as the "Jim-Crow" car, which said colored passengers were only required to purchase second class tickets at reduced fares (2 cents per mile).

That the defendants failed and refused to furnish any first class accommodations to the plaintiff and all other colored persons paying first class fares and engaged in interstate journeys between Memphis, Tennessee and Hot Springs, Arkansas, the route traveled by the plaintiff on his interstate journey, although first class accommodations and facilities were furnished all white passengers paying first class fares and engaged in interstate journeys between the points above mentioned.

It was further alleged that the acts of the defendants towards the plaintiff and all other colored persons as above set forth were perpetrated solely on account of the race and color of the plaintiff and all colored persons, and under

a claim that the Separate Car Law of Arkansas applied to interstate passengers.

The plaintiff further alleged that the acts of the defendants were unjust and unreasonable and in violation of Section 1, clause 5 of the Interstate Commerce Act; that in charging the complainant greater compensation for service rendered in transporting him as an interstate passenger than was charged from other persons for doing for them a like and contemporaneous service, to-wit, that defendants charged plaintiff the price of first class accommodations yet furnished him second class accommodations while furnishing first class accommodations to all other white persons who had purchased first class tickets for first class accommodations, the defendants did thereby unjustly discriminate against the plaintiff in violation of Section 2 of the Interstate Commerce Act; that defendants gave undue and unreasonable preference and advantage to certain white persons who had paid the same first class fare for transportation from Chicago to Hot Springs, on the same interstate journey as that being engaged in by the plaintiff and subjected plaintiff to undue and unreasonable prejudice and disadvantage, in this that white persons holding first class tickets were transported throughout the entire journey, in a first class car with first class accommodations and facilities, while plaintiff was compelled to ride in a second class car for more than four hours and for a distance of about one hundred sixty miles in order to complete his interstate journey, although the plaintiff had paid for and was holding a first class ticket identical with the white persons, which actions of the defendants were in violation of Section 3 (1) of the Interstate Commerce Act.

The plaintiff further alleged that defendants, in compelling plaintiff to ride in a second class car, with second class and inferior accommodations (a fair description of the "Jim-Crow" car is contained in *Arthur W. Mitchell* v. *Chi-*

cago, Rock Island and Pacific Railway Company, et al., 229 I. C. C. 703), to the first class cars in which all white persons holding first class tickets identical in costs with the first class ticket held by the plaintiff, claimed to act under the authority of the Separate Car Law of Arkansas, defendants' action claiming to be based on the fact that plaintiff is a colored person, and defendants' said practice in furnishing said unequal accommodations to colored persons holding first class tickets, causes undue and unreasonable advantage and preference to white persons holding first class tickets and undue and unreasonable prejudice to plaintiff and all other colored persons who in the future will use, as interstate passengers, the lines of the defendants, said undue and unreasonable advantage and preference to white persons and undue and unreasonable prejudice to colored persons and the plaintiff, who will in the future use defendants' lines, is in violation of Section 13 (4) of the Interstate Commerce Act.

It is further alleged that the Separate Car Law of Arkansas does not apply to interstate passengers and did not apply to the plaintiff who held a first class ticket entitling him to first class accommodations and facilities during the entire interstate journey from Chicago to Hot Springs.

It is further alleged that the actions of the defendants violated the rights of the plaintiff under the 14th Amendment of the United States Constitution in denying to the plaintiff the equal protection of the laws.

The relief requested by the complaint was that, after due hearing and investigation, the Commission enter an order commanding the defendants to cease and desist from the violations of the Act alleged in the complaint and to establish and apply in the future to the transportation of persons between the origin and destination named, in lieu of the services and facilities pleaded such other services and facilities as the Commission may deem reasonable and just.

Answers to the complaint were filed with the Commission by the defendants. The Pullman Company claimed that it had furnished without discrimination first class accommodations to the plaintiff and all other persons who applied and paid for such services as it had for sale and that it in no wise made any discrimination, although it was not a common-carrier; it further claimed that it did not own nor control the inferior accommodations in the equipment with which the plaintiff was compelled to occupy between Memphis, Tennessee, and Hot Springs, Arkansas, during a part of his interstate journey.

The Illinois Central admitted it was a common-carrier; did sell to plaintiff the first class round trip ticket from Chicago to Hot Springs; did receive the regular fare charged all other first class passengers and did furnish to the plaintiff equal accommodations with all other white passengers holding first class tickets on this interstate journey while plaintiff was traveling on the railroad from Chicago to Memphis.

The Rock Island admitted that it was a common-carrier by railroad; engaged in the transportation of passengers and was on April 20, 1937; it admitted the substance of the complaint by the plaintiff but denied that such acts constituted a violation of the Interstate Commerce Act and the Fourteenth Amendment of the United States Constitution and claimed to have acted under the Arkansas Separate Car Law.

Each of the defendants prayed a dismissal of the complaint. March 7, 1938, a hearing was held before an examiner of the Commission at Chicago, Illinois.

That the undisputed and uncontradicted testimony of the chief witness, Albert W. Jones, a conductor on the Rock Island for thirty-two years, offered by the defendant, Rock Island, fully sustains the allegations contained in the complaint filed before the Commission, an excerpt from the

abstract of his testimony as contained in the initial brief of the complainant and which was before the Commission is as follows:

P. 43:

"The only provision that the Rock Island has for carrying all colored passengers is in that part of the Jim Crow car." A colored person who has a first class ticket is compelled to ride in the Jim Crow car with all other colored persons who have second-class tickets or 'two-cent-per-mile' tickets. 'A white person with a first-class ticket is entitled to use the Pullman, the diner and observation car, which provide first class accommodations. (R. 148)."

P. 44:

"The Rock Island Railroad Company has no such first-class accommodations for Negroes, although the Negroes may have first-class tickets on the Rock Island Railway or 'three-cent-per-mile' tickets. During the thirty-two years I have worked over there in Arkansas, for the Rock Island Railroad Company it has never had any first-class accommodations for Negroes (R. 149). And they haven't any first-class accommodations in the sleeping cars for Negroes now."

"The Rock Island Railroad Company does not at this time have any first-class accommodations for colored passengers paying the 'three-cent-a-mile' fare permitting them to use the observation car which belongs to the Rock Island. They cannot use the dining car, nor sleeping car, although they may hold first-class tickets."

P. 45:

"Congressman Mitchell was sitting in Section 3 of the Pullman car alone (R. 134). I do not know if anyone occupied Section 3 from Memphis to Hot Springs on April 21st, but whether the space had been sold or not. I would not have sold a seat Section 3 or any other space in that Pullman car to Congressman

Mitchell, because he was a colored person. I know he had a first-class interstate round-trip ticket from Chicago, Illinois, to Hot Springs, Arkansas."

"The accommodations furnished to Negro passengers in the Jim Crow car where Congressman Mitchell was compelled to ride are not equal to the accommodations furnished in the observation car by the Rock Island Railway to white passengers holding first-class tickets." (R. 155).

"There is porter service furnished to the passengers in the observation car but no porter service furnished to the colored passengers in the Jim Crow cars" (R. 157).

"The Jim Crow car which all colored passengers were compelled to ride in in April, 1937, had three compartments (R. 158). There was no running water, no wash basins or towels. There were only paper towels furnished in the compartment of the Jim Crow car but linen and paper towels were furnished in the observation car (R. 160). There was only one toilet in the compartment where Congressman Mitchell was riding in the Jim Crow car, which was 'for women'. There was none for men who were riding in that compartment" (R. 161).

P. 46:

"I have never sold any colored person any space or accommodations in the Pullman car during my entire service."

"But I had charge of the train as the conductor for the company and having charge of the train for the company I felt it was my duty to put the congressman out of the sleeping car into the Jim Crow car (R. 168). The congressman did complain and protest being put out of the Pullman car. He showed me his ticket and offered to pay for the accommodations. But told him he was a colored man and couldn't ride in those first-class accommodations. If there had been a white passenger with a first-class ticket who had boarded the train at Memphis, for Hot Springs, and had asked for

a berth or a seat in that Pullman car, where there were vacant seats or had asked for a seat in the observation car, I would have sold it to him. I do not know how many colored people apply for Pullman tickets in Hot Springs, for Chicago, and are refused (169). If the compartments or stateroom are occupied, no colored person can ride in the body of the sleeping car. No colored persons are allowed to ride in the observation car which belongs to the Rock Island, even if they have first-class tickets. Those are the rules of the railway company and I follow the rules."

P. 47:

"I sell space on that train for seats in the observation car but would not sell a colored person any accommodations in the observation car, although he had a first-class ticket (R. 171). The white people and colored people are charged the same fare for the 'three-cent-per-mile' ticket, or the 'first-class tickets' (R. 172). There is no difference in the charge for the ticket because of color. The Pullman car is better equipped than the Jim Crow car. If a white passenger with a first-class ticket was put out of the Jim Crow car he could receive the first-class accommodations of the Pullman Car, and would not be compelled to purchase a compartment or a seat in the compartment. He could buy a seat in the Pullman car or observation car, or parlor car. The only requirement is, his having a first-class or 'three-cents-per-mile' ticket. They have the entire car (R. 174). Colored people can not ride in that car, even if they have a first- or second-class ticket. All the colored people who ride on my train must stay in the Jim Crow car, no matter what kind of a ticket they have."

Briefs were filed by all parties and on May 5, 1938, the Examiner issued a proposed report finding that the allegations of the complaint were substantially true but recommended a dismissal of the complaint. Exceptions were filed by the complainant to which the defendant Rock Island

replied. July 6, 1938, oral argument was made by the parties before the Commission in Washington, D. C.

November 7, 1938, the commission issued a report, *Arthur W. Mitchell* v. *Chicago, Rock Island & Pacific Railway Company*, 229 I. C. C. 703, containing its findings of facts and conclusions thereon. The complaint was dismissed although the facts constituting violations of the Interstate Commerce Act as alleged in the complaint and as shown by the evidence were admitted to be true. A petition for rehearing and reargument was filed by the plaintiff before the Commission, a reply was filed by the Rock Island and the petition for rehearing was denied March 6, 1939.

April 20, 1939, a petition was filed in the District Court for the Northern District of Illinois, Eastern Division, under the Urgent Deficiencies Act, 38 Stat. 219; U. S. C. A., Tit. 28, Sec. 41 (27) and (28) and Secs. 43-48, in equity, in which the District Court was requested to enter a decree setting aside, annulling and vacating the order of the Commission on November 7, 1938, which dismissed the plaintiff's complaint in No. 27844, *Arthur W. Mitchell* v. *Chicago, Rock Island & Pacific Railway Company, et al.* The suit was filed against the three defendants, who were parties before the Commission, the United States and the Interstate Commerce Commission as required by law.

Answers were filed by the defendants and the cause was heard before a three Judge court. A complete transcript of the Evidence and the proceedings before the Commission having been certified, were introduced as evidence along with the proposed report of the Examiner and the final report and orders of the Commission. June 27, 1940, an order and decree was entered by the District Court dismissing the cause upon the findings of fact and conclusions of law filed with the decree and order.

An appeal has been prayed and allowed to this court under the statutes in such case made and provided.

V. The grounds upon which it is contended the questions involved are substantial are as follows:

1.

The District Court in dismissing the Petition of the plaintiff for lack of jurisdiction, although a negative order, in form was a denial of the rights, privileges and immunities claimed by the plaintiff and in effect was an affirmative order. Such order and decree is final and appealable.

Rochester Telephone Company v. *United States et al.*, 307 U. S. 125, 130, 135;

United States v. *Maher*, 307 U. S. 148, 152;

Baltimore & Ohio Railroad Company et al. v. *United States et al.*, 49 S. Ct. 492, 73 L. Ed. 954; 279 U. S. 781, 783;

Manufacturers Railway Co. & St. Louis Southwestern Railway Company v. *United States, and Interstate Commerce Commission*, 246 U. S. 457, 460.

2.

The Petition filed in the United States District Court by the plaintiff was to set aside, annul or suspend an order of the Interstate Commerce Commission entered November 7, 1938 which order dismissed the complaint filed by the plaintiff with the Interstate Commerce Commission seeking a cease and desist order.

Title 28 U. S. C. A. Par. 41 (28).

3.

A direct appeal to the Supreme Court of the United States is authorized from the final order and decree entered in this cause by the three judge court June 27, 1940.

Title 28 U. S. C. A. Sec. 47-a; (Judicial Code, Sec. 210);

Atchison, Topeka & Santa Fe Railway Co., et al. v. *United States et al.*, 279 U. S. 768, 770, 49 S. Ct. 494; 73 L. Ed. 947.

4.

The rights, privileges and immunities claimed by the plaintiff and denied him, by the order of the Interstate Commerce Commission and the final order and decree of the United States District Court, are based upon the Constitution of the United States, Fourteenth Amendment thereof and the Laws of Congress enacted pursuant thereto.

Fourteenth Amendment of the United States Constitution, Secs. 1-5.

Section 1 declares the plaintiff to be a citizen of the United States and of the State of Illinois, and forbids any state, to make or enforce any law which shall abridge the privileges and immunities of any citizen of the United States; to deprive any person of life, liberty or property without due process of law and to deny any person within its jurisdiction the equal protection of the laws.

Section 5 thereof grants to Congress the power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment.

Article IV of the United States Constitution provides that citizens of each State shall be entitled to *all* privileges or immunities of citizens in the several States.

Title 3 U. S. C. A. Secs. 41 and 43, (referred to as the Civil Rights or Enforcement Acts).

Section 41 guaranteed the right of the plaintiff to make and enforce his contract for first-class facilities on his interstate journey and gave to him the *full* and *equal* benefit of all laws for the security of his person and property as enjoyed by white persons.

Section 43 prohibits *every person* under color of any statute, * * * regulation, custom or usage, of any State

• • • from doing any act which subjects or causes to be subjected, any citizen of the United States • • • within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

5.

The plaintiff having paid for a first-class ticket and having been accepted as a first-class interstate passenger by the common carriers, was entitled to the equal enjoyment of equal accommodations and facilities, furnished to all first-class interstate passengers, engaged in the same journey, and a denial to the plaintiff of the use of available space in the Pullman car, by the train conductor while according the use of first-class facilities and accommodations to other white persons paying the identical fare paid by the plaintiff, was a violation of the Interstate Commerce Act and the Constitutional rights of the plaintiff.

McCabe v. *Atchison, Topeka and Santa Fe Railway Company,* 235 U. S. 151, 35 S. Ct. 69, 71;

Buchanan v. *Warley,* 245 U. S. 60, 38 S. Ct. 16, 19, 20;

Missouri ex rel. Gaines v. *Canada, Registrar of the University of Missouri et al.,* 305 U. S. 337, 344, 350, 351;

Interstate Commerce Act, Title 49 U. S. C. A., Secs. 1 (5), 2 and 3 (1), 13 (4), 15 (1).

6.

The right to receive equal accommodations and facilities with all other persons paying the identical fare with the plaintiff is a personal right and is not dependent upon whether any other colored person or persons failed to exercise such right or not. This honorable court has conclusively decided this question in favor of the contention of the

plaintiff and the order of the commission and decree of the district court are contrary to the decisions of this Court.

McCabe v. *Atchison, Topeka & Santa Fe Railway Company,* 235 U. S. 151; 35 S. Ct. 69, 71;

Buchanan v. *Warley,* 245 U. S. 60, 38 S. Ct. 16, 19, 20;

Missouri ex rel. Gaines v. *Canada, Registrar of the University of Missouri et al.,* 305 U. S., 337, 344, 350, 351.

7.

The order of the Commission and the decree of the District Court are contrary to the former decisions of the Interstate Commerce Commission which holds that it was the duty of the railways to furnish, for all passengers paying the same fare, cars in all respects equal and provided with the same comforts, accommodations and protection for travelers.

Councill v. *Western & Atlantic Railroad Co.,* 1 I. C. C. 339, 1 I. C. C. 638;

Heard v. *Georgia Railroad Company,* 1 I. C. C. 428, 1 I. C. C. 719;

Edwards v. *Nashville, Chattanooga & St. Louis Ry Co.,* 12 I. C. C. 247, 249.

In each of which cases a cease and desist order was issued and acts similar to the acts alleged in the complaint of the plaintiff and proven by indisputable evidence on the hearing, were held to be *undue* and *unjust discrimination* against the colored passengers.

8.

Under the Interstate Commerce Act the plaintiff was compelled to file his complaint and obtain a ruling from the Commission before applying to the courts for relief.

Title 49, U. S. C. A. Sec. 1, par. 2, Sec. 1 (par. 1), sec. 13, pars. 1, 3, 4; sec. 15 (1).

2.

Under the Constitution Congress is given exclusive jurisdiction over interstate commerce and the separate car law of the State of Arkansas has no application to interstate passengers.

United States Constitution, Art. 1, sec. 8 (Interstate Commerce clause);

McCabe v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 59 L. Ed. 169, 35 S. Ct. 69, 70. IN WHICH THIS COURT HELD THAT IN THE ABSENCE OF A DIFFERENT CONSTRUCTION BY THE HIGHEST COURT OF THE STATE, THE SEPARATE CAR LAWS OF THE STATES, MUST BE CONSTRUED AS APPLYING TO TRANSPORTATION EXCLUSIVELY INTRASTATE, IN ORDER NOT TO CONTRAVENE THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. CASES ARE THEREIN CITED TO CONCLUSIVELY SUSTAIN THIS CONTENTION, AND THE ORDER OF THE COMMISSION AND THE DECREE OF THE DISTRICT COURT ARE CONTRARY TO THESE DECISIONS OF THIS HONORABLE COURT.

Hall v. *DeCuir*, 95 U. S. 485; 24 L. Ed. 547, 501. One of the earliest cases to decide this point is in harmony with the subsequent decisions of this Honorable Court, cited in *McCabe* v. *Atchison, Topeka & Santa Fe Railway Company*, 235 U. S. 151.

Brown v. *Memphis & C. Ry. Co.*, 5 Fed. 499, 501 (C. C. Tenn. 1880);

Huff v. *Norfolk & Southern Railway*, 88 S. E. 344, 345; 171 N. C. 203, 205;

Washington, B. & A. Electric R. Co. v. *Waller*, 289 Fed. 598, 600 (C. C. A. D. C.);

Hart v. *State of Maryland*, 100 Md. 595; 60 Atl. 457. 463.

10.

The order of the Commission and the decree of the District Court are contrary to the previous decisions of the various Federal and State courts, which hold, that common carriers, engaged in interstate commerce are bound to provide for colored passengers, holding first-class tickets, accommodations precisely equal in all respects to those provided for white passengers holding similar tickets and traveling in interstate commerce.

Gray v. *Cincinnati Ry. Co.*, 11 Fed. 683, 686 (C. C. Ohio, 1882);

Murphy v. *Western & A. Railroad Co.*, 23 Fed. 637, 639 (C. C. Tenn. 1885). Which also holds that a passenger has a right to choose whether he will contract and purchase first, second, or third-class tickets and is entitled to the kind and class of accommodations or facilities, throughout his journey, according to the fare paid and accommodations contracted for by him;

Logwood and Wife v. *Memphis & C. Ry.*, 37 Fed. 318, 319 (C. C. Tenn. 1885). Which holds that common carriers are required by law not to make any unjust discrimination, and must treat all passengers paying the same price alike.

The Sue, 22 Fed. 843, 845 (D. C. Md. 1835);

Houck v. *Southern Pacific Ry. Co.*, 38 Fed. 226, 228 (C. C. Tex. 1888) holding; "It is the duty of carriers to furnish to the colored passenger who pays a first-class fare over the line, a car to ride in as safe, and substantially as comfortable and inviting, to travel in, as it furnishes to white passengers paying similar first-class fares."

McGuinn v. *Forbes, et al.*, 37 Fed. 639 (D. C. Md. 1889).

11.

The action sought to be reviewed involves an order of the commission and final decree of the District Court refusing to forbid further unjust discrimination by the common carriers and compel them to cease their violations of the sections of the Interstate Commerce Act, above mentioned, which violations are prejudicial to the rights of the plaintiff and all other American citizens who are persons of color and is reviewable by this direct appeal.

Rochester Telephone Company v. *United States, et al.*, 307 U. S. 125, 130, 135.

12.

The order of the commission and the decree of the United States District Court are entirely void for the following reasons;

(a) They are unsupported by any evidence appearing in the record,

(b) They are contrary to the indisputable character of the evidence,

(c) They are arbitrary and baseless,

(d) They are inconsistent with rational justice,

(e) They come under the constitution's condemnation of all arbitrary exercise of power,

(f) They are contrary to the undisputed uncontradicted evidence contained in the record,

(g) They are based upon a misapprehension of the law and an erroneous construction of the law,

(h) They are contrary to the United States Constitution, the fourteenth amendment thereto, and the laws of Congress enacted under the authority of the Constitution,

(i) They are contrary to and conflict with the former decisions of the Interstate Commerce Commission in cases involving the identical situation as the case at bar,

(j) They are contrary to the decisions of the United States Supreme Court and the subordinate Federal courts,

(k) They are contrary to the evidence of record and are without support of any evidence in the record,

(l) They deny to the plaintiff and all other American citizens of color traveling in interstate commerce, as first class passengers, having paid first class fares, the due process of law and the equal protection of the laws guaranteed by the fourteenth amendment of the United States Constitution.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91 (and cases cited in the opinion of the court).

13.

The finding and order of the Commission and the decree of the District Court are not conclusive, as matters of constitutional rights are not to be conclusively determined by the Commission.

Manufacturer's Railway Company and St. Louis Southwestern Railway Company v. *United States and Interstate Commerce Commission*, 246 U. S., 488, 489.

14.

The Fourteenth Amendment is one of a series of constitutional provisions having a common purpose, namely securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoyed. * * * It was designed to assure to the colored race the enjoyment of all the

civil rights that under the law are enjoyed by white persons, etc.

Strauder v. *West Virginia,* 100 U. S., 303, 306, 25 L. Ed. 664.

Buchanan v. *Warley,* 245 U. S. 60, 38 S. Ct. 16, 19.

15.

The Federal Constitution and the law passed within its authority by the express terms of that instrument are made the supreme law of the land and the defendants cannot legally claim protection under any State law which is contrary to or conflicts with the Federal Constitution or any law passed within its authority.

Buchanan v. *Warley,* U. S. 245, 60, 38 S. Ct. 16, 18.

16.

The principles of justice and equality in the transportation of persons and property, enunciated by the decisions of the Interstate Commerce Commission, and above set forth herein, the United States Supreme Court and the inferior Federal courts are embedded in the Interstate Commerce Act, and rest upon no less a foundation than the Constitution of the United States. The equality of civil and political rights and equal protection of the law without discrimination (except for misconduct or crime) are subjects not open for discussion. They are fundamental principles of government and jurisprudence. Whoever attempts to deny these principles in their just application puts himself in antagonism to the established law of the land.

Heard v. *Georgia Railroad Company,* 1 I. C. C. 428, 431, 432.

17.

If a railroad company, engaged in interstate commerce, provides certain facilities and accommodations for first

class passengers of the white race, it is commanded by the law that like accommodations shall be provided for colored passengers of the same class. The principle that must govern is that the carriers must serve equally well, all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects the passengers to "undue and unreasonable prejudice and disadvantage".

Dissenting opinion, Commissioner Lee, *Arthur W. Mitchell* v. *Chicago, Rock Island and Pacific Railway Company et al.*, 229 I. C. C. 703, quoting from *Edwards* v. *Nashville, Chattanooga and St. Louis Railway Company*, 12 I. C. C. 247, 249.

Conclusion.

Simple justice in the interpretation and application of the Federal Constitution, the Fourteenth Amendment and all laws made pursuant thereto, should require equality in interstate transportation of all American citizens without regard to race or color, as any other interpretation will nullify their plain and unambiguous provisions.

Respectfully submitted,

RICHARD E. WESTBROOKS,
ARTHUR W. MITCHELL *pro se*,
Solicitors for Plaintiff.

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 17 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Brief for Appellant.

RICHARD E. WESTBROOKS,
Chicago, Illinois

and

ARTHUR W. MITCHELL, *Pro Se,*
Chicago, Illinois
Attorneys for Appellant.

PRINTED BY CHICAGO LAW PRINTING CO.

FILED NOVEMBER 18, 1940
PROBABLE JURISDICTION NOTED DECEMBER 16, 1940.

BLANK PAGE

SUBJECT INDEX.

	PAGE
Opinions below	1
Jurisdictional Statement	2
Statutory Jurisdiction	2
Proceedings before the Interstate Commerce Commission	2
Proceedings before United States District Court	4
Constitutional Jurisdiction	6
Jurisdiction by Judicial Interpretation of the Law	9
Statutes Involved	10
Statement of the Case	11
Specification of Errors	15
Summary of Argument	18
Argument:	
I. The Appellant, an American citizen, was engaged in through interstate travel from Chicago, Illinois, to Hot Springs, Arkansas, as a first-class passenger, he having paid a first-class fare and the separate coach law of the State of Arkansas was inapplicable to this interstate journey	22
A. A case in point	32
II. Volume of traffic cannot be used as a basis for discrimination against an interstate passenger holding a first-class ticket	34
III. The claim by the defendant, Rock Island, that it was attempting to follow the separate coach law of Arkansas and disregard the plain provisions of the Constitution of the United States, and the laws made in pursuance thereof, is untenable, and the report of the Commission shows its misconception of the law	47

PAGE

Argument (continued):

IV. Personal rights 49
A. Personal rights include personal liberty 51

V. Personal rights include the equal protection of the laws and the right to contract for first-class services, accommodations and facilities in interstate commerce, and further includes the right to enforce the contract in the event of its violation by the common carrier 53

VI. The Interstate Commerce Act contains a national comprehensive system for the regulation of interstate commerce, which excludes the application of the local separate coach law of the state 58

VII. Congress has prohibited discrimination, undue prejudice, unreasonable and undue advantage and preference in relation to citizens traveling as interstate passengers 64

VIII. The appellant having suffered direct injury to his rights guaranteed by the Constitution of the United States and laws made pursuant thereof has the absolute right to prosecute these proceedings 66

IX. What is unjust discrimination prohibited by the Interstate Commerce Act 67

X. Custom does not justify continued unjust discrimination 69

XI. Erroneous holding of the Commission concerning the right of the appellant to purchase and use first-class accommodations in interstate commerce 69

PAGE

Argument (continued):

XII. Refund of money is not adequate redress for the wrongful exclusion by a common carrier of an American citizen engaged in an interstate journey as a first-class passenger 73

XIII. Judicial notice 74

XIV. Questions not involved in this appeal 75

XV. The order of the Interstate Commerce Commission and the decree of the District Court should be reviewed by this Court and set aside 77

A. The order rests on an erroneous application of the law 77

B. The order is without any support of evidence 78

XVI. Cases which have been cited by some of the defendants in prior stages of this proceeding which we claim are not in point 79

Conclusion 89

Table of Cases.

Alabama Ry. Company v. Morris, 103 Miss. 511; 60 So. 11; Ann. Cas. 1915-B, 613..... 85

American Express Company v. United States, 212 U. S. 522, 523, 29 S. Ct. 315..... 69

Anderson v. L. & N. Ry. Company, 62 F. 46..... 30

Armour & Company v. The Alton Ry. Company, 293 October Term, 1940, Op. February 3, 1941..... 9

Arthur W. Mitchell v. Chicago, Rock Island & Pac. Railway Co., 229 I. C. C. 703..... 14, 50

Atchison T. & S. F. Ry. Company et al. v. United States et al., 279 U. S. 768, 770; 49 S. Ct. 494; 73 L. Ed. 947..... 10

PAGE

TABLE OF CASES (CONTINUED).

Baltimore & Ohio Ry. Company et al. v. United States et al., 49 S. Ct. 492; 73 L. Ed. 954; 279 U. S. 781, 783 9

Baltimore & Ohio R. R. Company v. United States, 277 U. S. 291, 300, 301 78

Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357 53

Berea College v. Commonwealth of Kentucky, 211 U. S. 45, 53, 54; 29 S. Ct. 33, 35; 53 L. Ed. 81 (1908) 83

Brown v. Memphis & C. Ry. Company, 7 F. 51, 63 (C. C. Tenn.) 57, 73, 86

Buchanan v. Warley, 245 U. S. 60, 74, 75, 76, 77, 78, 79, 80; 38 S. Ct. 16 (1917) 38, 46, 66, 82, 83

Case of the State Freight Tax, 15 Wall. (82 U. S.) 232 ..... 6, 32, 62

C. & O. R. R. Company v. Kentucky, 179 U. S. 288 30

C. B. & Q. Railway Company v. Iowa, 94 U. S. 155; 24 L. Ed. 94 29

Chesapeake & Ohio R. Company v. Kentucky, 179 U. S. 388, 391; 45 L. Ed. 244, 246; 21 S. Ct. 101 ..... 23, 25

Chiles v. Chesapeake & Ohio R. Company, 218 U. S. 71; 54 L. Ed. 936, 30 S. Ct. 667; 20 Ann. Cas. 980 ..... 23, 33, 83

Cohens v. Virginia, 6 Wheat. 264, 379 8

Cooley v. Board of Wardens, 12 How. 299 32

Councill v. Western & Atlantic R. R. Co., 1 I. C. C. 339 ..... 55, 57

Cozart v. Southern Ry. Co., 16 I. C. C. 226, 230, (1909) 88

Dent v. West Virginia, 129 U. S. 114, 9 S. Ct. 231 53

Denver & R. G. R. Company v. Baer Brothers Mercantile Company, 187 F. 485; 109 C. C. A. 337; 34 S. Ct. 641; 233 U. S. 479; 58 L. Ed. 1055 58

Duncan v. Missouri, 152 U. S. 382; 14 S. Ct. 570 53

PAGE

TABLE OF CASES (CONTINUED).

Edwards v. Nashville, Chattanooga & St. Louis Ry. et al., 12 I. C. C. 247.....55, 57, 88

Ex Parte Virginia, 100 U. S. 339..... 53

Florida East Coast Ry. Company v. United States, 234 U. S. 167..... 78

Gaines v. Seaboard Airline Ry. et al., 16 I. C. C. 471 (1909)..... 88

Gibbons v. Ogden, 9 Wheat. 1, 196.....30, 31, 32, 33, 62

Gold-Washing & Water Company v. Keyes, 96 U. S. 199, 201..... 9

Gray v. Cincinnati Ry. Co., 11 F. 683, 686..... 57

Hall v. DeCuir, 95 U. S. 485.....24, 29, 30, 31, 32, 33, 45, 53, 54, 86

Harriman v. Interstate Commerce Commission, (N. Y. 1908), 29 S. Ct. 115, 118; 211 U. S. 407, 418; 53 L. Ed. 253..... 58

Hart v. State, 60 Atl. 457, 463; 100 Md. (March 22, 1905).....28, 29, 33, 86

Hartness v. Iberia, etc., Ry. Company (D. C. La. 1924), 297 F. 622, 624..... 59

Haskell v. Cowhan, 187 F. 403, 408..... 32, 62

Heard v. Georgia R. R. Co., 1 I .C. C. 428..... 55, 57

Heard v. Georgia R. R. Co., 3 I. C. C. 111..... 57

Hines et al. v. Davidowitz et al., Op. January 20, 1941, No. 22, October Term 1940.....26, 32, 46, 62

Huff v. Norfolk & Southern R. R. Co., 88 S. E. 344, 345; 171 N. C. 203 (March 22, 1916)..... 29

In Re Grice, 79 F. 627, 645..... 52

Interstate Commerce Commission v. Cincinnati N. O. & Texas Pacific Ry. Company, 167 U. S. 479; 17 S. Ct. 896; 42 L. Ed. 243..... 58

PAGE

TABLE OF CASES (CONTINUED).

Interstate Commerce Commission v. Diffenbaugh, 242 U. S. 42 78

Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91 78

Johnson v. Southern Pacific Company, 196 U. S. 1; 25 S. Ct. 158; 49 L. Ed. 363 59

Lehigh Valley Ry. Company v. Public Service Commission, Second District of the State of N. Y. (D. C. N. Y. 1921), 272 F. 753, Aff'd. (1922); 42 S. Ct. 239; 256 U. S. 591; 66 L. Ed. 385 61

Logwood and Wife v. Memphis & C. Ry., 23 F. 318, 319 57

Loomis v. Lehigh Valley Ry. Company, 240 U. S. 43, 48, 50, 59, (1915) 9

Louisville N. O. & T. R. Company v. Mississippi, 133 U. S. 587, 590 L. Ed. 784, 785; 2 Inters. Comm. Rep. 801; 10 S. Ct. 348 ..... 23, 25

Macon Grocery Company v. Atlantic Coastline Ry. Company, 215 U. S. 501, 506, 507, 508 8

Manufacturers Ry. Company & St. Louis Southwestern Ry. Company v. United States and Interstate Commerce Commission, 246 U. S. 456, 457 ..... 9, 76, 77

McCabe v. Atchison T. & S. F. Ry. Company, 235 U. S. 151, 161, 162 (1914); 59 L. Ed. 169; 35 S. Ct. 69 ..... 16, 23, 24, 30, 34, 35, 38, 41, 46, 49, 50, 58, 71, 75, 77

Merchants Warehouse Company v. United States, et al., 283 U. S. 501, 508 76

Minnesota Rate Case, 230 U. S. 352; 33 S. Ct. 729; 57 L. Ed. 1511; 48 L. R. A. (N. S.) 1151; Ann. Cas. 1916 A-18 ..... 6, 9, 32

Munn v. Illinois, 94 U. S. 113; 24 L. Ed. 77 29

Murphy v. Western & A. R. R. Co., 23 F. 637, 639, 640 57

New England Divisions Case, 261 U. S. 184, 204 76

TABLE OF CASES (CONTINUED).

PAGE

Northern Pacific Ry. Company v. Solum, 247 U. S. 477, 483, 484 9

Ohio Bell Telephone Company v. Public Utilities Company of Ohio, 301 U. S. 292, 301 75
Osborne v. Bank of United States, 9 Wheat. 738, 822 8

Patton v. Brady, 184 U. S. 608, 611 8
Pearson v. Dunne, 4 Wall. 605 73
Peik v. Chicago & N. W. R. R. Co., 94 U. S. 164, 24 L. Ed. 97 29
Pennsylvania Company v. United States, 236 U. S. 351; 35 S. Ct. 370; 59 L. Ed. 616 ..... 67, 76
Plessy v. Ferguson, 163 U. S. 537 ..... 30, 51, 79, 80, 82

Railway Company v. Illinois, 118 U. S. 557; 7 S. Ct. 4; 30 L. Ed. 244 29
Railroad Commission of Louisiana v. T. & P. Ry. Company, 229 U. S. 336; 35 S. Ct. 837; 57 L. Ed. 1215 33
Railway Company v. Mississippi, 133 U. S. 587; 10 S. Ct. 348; 33 L. Ed. 784 ..... 9, 33
Rochester Telephone Company v. United States et al., 307 U. S. 125, 130, 135 ..... 9, 78

Seaboard Airline Ry. Company v. United States, 254 U. S. 57, 62 76
Skinner & Eddie Corporation v. United States, 249 U. S. 557, 562 76
Smith v. Tennessee, 100 Tenn. 494 ..... 29, 85, 86
Smith v. Texas, No. 33, October Term 1940, United States Supreme Court, Op. November 25, 1940 ..... 57, 80
South Covington & Cincinnati S. T. Ry. Co. v. Kentucky, 252 U. S. 399; 40 S. Ct. 378, (Decided April 19, 1920) 86
South Covington Ry. Co. v. Covington, 235 U. S. 537, 35 S. Ct. 158, 59 L. Ed. 350, L. R. A. 1915 F. 792 88

PAGE

TABLE OF CASES (CONTINUED).

Southern Pacific Ry. Company v. Interstate Commerce Commission, 219 U. S. 498; 31 S. Ct. 279; 55 L. Ed. 310 33

Southern Ry. Company v. Norton, 73 So. 1; 112 Miss. 302, (December 4, 1916) 30, 85, 86

Southern Railway Company v. Primrose, 73 So. 2 85

State ex rel Abbott v. Hicks, 44 La. Criminal 30

State of Missouri at the relation of Lloyd Gaines, Petitioner v. I. W. Canada, Registrar of the University of Missouri and the Curators of the University of Missouri, 305 U. S. 337, 350 ..... 43, 46

Strauder v. West Virginia, 100 U. S. 303, 306; 25 L. Ed. 664 ..... 71, 75

The Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 320 ..... 67, 78

The Daniel Ball, 10 Wall. 557; 19 L. Ed. 999 33

The Sue, 23 F. 843, 844, 845, 846, 848 57

Tennessee v. Davis, 100 U. S. 257 9

Texas & Pacific Ry. Company v. Abilene Cotton Oil Company, 204 U. S. 426, 439; 27 S. Ct. 350; 51 L. Ed. 553 58

Texas & Pacific Ry. Company v. Interstate Commerce Commission, (N. Y. 1896), 162 U. S. 197; 16 S. Ct. 666; 40 L. Ed. 940 ..... 6, 60, 62

Truax v. Raich, 239 U. S. 33, 38 66

United States v. Chicago Heights Trucking Company, et al., 310 U. S. 344, 351, 352 (1939) 6, 47, 68

United States ex rel Weinberg v. Scholtfeldt, etc., 26 F. Supp. 283, 284 74

United States v. F. W. Darby Lumber Co., et al., 82 October Term 1940, Op. February 3, 1941 ..... 6, 62

United States v. Louisville & Nashville R. R. Company, 235 U. S. 314, 320 76

PAGE

TABLE OF CASES (CONTINUED).

United States v. Maher, 307 U. S. 148, 152 9

United States of America v. Appalachian Electric Power Company, Op. December 16, 1940, No. 12, October Term 1940, Supreme Court 32

Wabash, St. Louis & Pacific Railway Company v. Illinois, pp. 557, 573, 575, 576, 577 30

Washington B. & A. Electric R. Company v. Waller, 289 F. 598, 600 (C. C. A. D. C. May 7, 1923) 32, 33

West v. Kansas National Case Company, 221 U. S. 229; 31 S. Ct. 564; 55 L. Ed. 716; 35 L. R. A. (N. S.) 1193 32

West v. Kansas Natural Gas Company, 221 U. S. 229; 31 S. Ct. 564; 55 L. Ed. 716; 35 L. R. A. (N. S.) 1193 ..... 6, 32

White v. Greenhow, 114 U. S. 307 9

Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064 53

STATUTES, CONSTITUTIONS AND TEXTBOOKS.

Separate Coach Law of the State of Arkansas (Pope's Digest, Chap. XX, Sections 1190 to 1201) 8, 11, 13, 15, 18, 22, 26, 28, 35, 47, 50

Title 8, U. S. C., Chap. 3, Sec. 41—Civil Rights 6, 10, 15, 48, 52, 57, 64, 66, 74

Title 8, U. S. C., Chap. 3, Sec. 43—Civil Rights 6, 10, 48, 52, 57, 64, 66, 74

Title 28, U. S. C., Sec. 41, Sub. Div. 14 ..... 4, 8, 10

Title 28, U. S. C., Sec. 41, Sub. Div. 28 ..... 4, 10, 68

Title 28, U. S. C., Sec. 43 ..... 4, 10

Title 28, U. S. C., Sec. 45 ..... 4, 5, 10

Title 28, U. S. C., Sec. 47-a 1, 2, 5, 10

Title 28, U. S. C., Sec. 47-a 1, 2, 4, 10

Title 28, U. S. C., Sec. 48 ..... 4, 10, 15

PAGE

STATUTES, CONSTITUTIONS AND TEXTBOOKS (CONTINUED).

Title 49, U. S. C., Sec. 1, Par. 1.....6, 10, 15, 65
Title 49, U. S. C., Sec. 1, Par. 2.....6, 10, 65
Title 49, U. S. C., Sec. 1, Par. 5.....3, 6, 10, 15, 57, 65, 68
Title 49, U. S. C., Sec. 2.....6, 10, 15, 57, 65, 68
Title 49, U. S. C., Sec. 3, Par. 1.....3, 6, 10, 15, 57, 65, 68
Title 49, U. S. C., Sec. 4.....6, 10, 15
Title 49, U. S. C., Sec. 13, Par. 1.....2, 6, 9, 10, 65, 67
Title 49, U. S. C., Sec. 13, Par. 4.....4, 9, 10, 65
Title 49, U. S. C., Sec. 15, Par. 1.....4, 6, 10
Title 49, U. S. C., Sec. 15, Par. 2.....4, 6, 10
Article I, Sec. 8, Cl. 3, United States Constitution 6, 11, 15, 45, 63
Article I, Sec. 10, Cl. 1, United States Constitution.... 11
Article IV, Sec. 2, Cl. 1, United States Constitution 8, 11, 15, 44, 57, 62, 66, 74
Article VI, Cl. 2, United States Constitution.....7, 11, 15, 78
Fourteenth Amendment to the Constitution of the United States, Sections 1 and 5.....8, 11, 15, 57, 66, 74
Oklahoma Statute, Section 7..... 26, 35
Alien Registration Act..... 26
The Federalist..... 27
1 Bl. Com. 134..... 51
5 Wigmore Evidence, Pars. 2571, 2580, 2583..... 75
Thayer Preliminary Treatise on Evidence, pp. 277, 301 75

APPENDICES
PAGES

APPENDIX A—
Statutes involved 1-11
Constitutional provisions involved 12-13
APPENDIX B—
Separate coach law of Arkansas 15-18
APPENDIX C—
Abstract of evidence before the Commission..... 19-50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Brief for Appellant.

OPINIONS BELOW.

The District Court, specially constituted under Sec. 210 of the Judicial Code, as amended, (Title 28 U. S. C. A., Secs. 47 and 47-a), for the Northern District of Illinois, Chicago, Illinois, entered an order and decree, June 27, 1940, dismissing the petition, without an opinion, said order and decree, is found in the record, p. 52, attached to the order and decree were the findings of fact and conclusions of law (R. 52). The order of the Interstate Commerce Commission, dismissing the complaint is reported in 229 I. C. C. 703, and is found in the record, pp. 18-34.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Statutory Jurisdiction.

The jurisdiction of this Court is based upon Sec. 210 of the Judicial Code, as amended (Title 28, U. S. C., Secs. 47 and 47-a) (Judicial Code and Judiciary) (Appendix A, pp. 4-6). These sections provide for a hearing by a special Court composed of three Judges and for a direct appeal to the Supreme Court of the United States from a final judgment or decree of the Court.

Proceedings Before the Interstate Commerce Commission.

Arthur W. Mitchell, the appellant, a citizen of the United States and a person within the jurisdiction thereof filed his verified complaint with the Commission under the Interstate Commerce Act (Title 49, U. S. C., 13 (1)) (Appendix A. p. 9) (R. 3-9). The complaint charged among other things, that the defendants[1] by their conduct towards the appellant had violated certain provision of the Interstate Commerce Act.

After due notice to the defendants answers were filed to the complaint by each of the defendants (R. 7-9). The complaint alleged that the complainant was a passenger, traveling in interstate commerce on a continuous journey

[1] The original defendants to the complaint were Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation; and Pullman Company, a corporation.

between Chicago, Illinois and Hot Springs, Arkansas; that the defendants were common carriers engaged in the transportation of passengers between Chicago and Hot Springs, and were subjected to the provisions of the Interstate Commerce Act. That certain provisions of the Interstate Commerce Act, the Constitution of the United States and the Amendments to the United States Constitution had been violated by the acts of the defendants towards the complainant (now the appellant) while on this interstate journey (Title 49, U. S. C., Sec. 1, Cl. 5) (Appendix A, p. 7); (Sec. 2) (Appendix A, p. 8), (Sec. 3, Cl. 1) (Appendix A, pp. 8-9) and (Sec. 13). The complaint further charged that the rights of the complainant guaranteed by the Fourteenth Amendment (Appendix A, p. 12), of the United States Constitution had been violated and that he had been denied the equal protection of the laws by the conduct of the defendants.

He further alleged that the defendants were claiming to justify their conduct towards the complainant by virtue of the Separate Coach Law of the State of Arkansas (Appendix B, pp. 15-17).

A hearing was had and evidence taken before an Examiner of the Commission (R. 9) who made his proposed report to the Commission (R. 10-17).

The Examiner found that the material facts alleged in the complaint had been proven by indisputable evidence but recommended that the complaint be dismissed (R. 17).

Exceptions were duly filed by the complainant (R. 17, 260, 279).[2]

---

[2] The exceptions filed by the complainant, hereinafter called the appellant, were introduced and admitted in evidence by the District Court ~~but~~ Which the Interstate Commerce Commission had marked Exhibit 1 (R. 222).

The cause came on for hearing before the full Commission for oral argument[3] (R. 18) and subsequently the report of the commission was filed (R. 18-33).[4]

The report of the Commission was in accordance with the proposed report of the Examiner and the findings of the facts alleged in the complaint, were found to be fully proven but, the report of the six Commissioners contained erroneous conclusions of law and the complaint was dismissed.

The five dissenting opinions find that the provisions of the Interstate Commerce Act had been violated (R. 30-33).

A petition for rehearing and re-argument was duly filed by the appellant with the Commission (R. 34) which petition was denied (R. 35).

Proceedings Before United States District Court.

A petition was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, under the provisions of the Interstate Commerce Act (R. 3-40).[5]

In the District Court the suit was brought against the United States and others[6] were made defendants as pro-

---

[3] Title 49, U. S. C., Secs. 13 (4) (Appendix A, p. 9); Sec. 15 (1) (Appendix A, p. 10); Sec. 15 (2) (Appendix A, p. 11).

[4] Dissenting opinions were filed by five members of the Commission and only six members of the Commission concurred in the report.

[5] Section 24 of the Judicial Code (Title 28, U. S. C., Sec. 41) and (Title 28, U. S. C., Sec. 41 (28)) (Appendix A, p. 2); (Title 28 U. S. C., Sec. 43) (Appendix A, p. 3); (Title 28 U. S. C., Sec. 45).

[6] The defendants in the District Court were United States of America, Frank O. Lowden, James E. Gorman,

vided by law. Answers were filed by all defendants (R. 41-42) and the cause was set for hearing before a specially constituted Court of three Judges.[7]

The District Court filed its finding of fact and conclusions of law (R. 52, 53) and entered an order and final decree dismissing the cause for lack of jurisdiction at the cost of the complainant (R. 53), June 27, 1940.

Notice of appeal was served and filed in the District Court, August 23, 1940 (R. 53, 54), accompanied by a petition for appeal (R. 55) and assignment of errors (R. 55-61). An order was entered granting the appeal (R. 61) and approving the appeal bond (R. 62). A praecipe for transcript of record was filed (R. 64) and various orders were entered extending the time to file the transcript of record in this Court, to and including November 21, 1940 (R. 63).

An order was entered by the Court that all original petitions be included in the transcript of record and that the same stand in lieu of a narrative statement of evidence and be so certified to this Court (R. 63). This procedure was in accordance with the provisions of the Judicial Code.[8]

The transcript of record was filed in this Court November 18, 1940.

The appellant claimed that the acts of the defendants by their conduct during his journey as an interstate pas-

---

and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation; Illinois Central Railway Company, a corporation; and Pullman Company, a corporation. The Interstate Commerce Commission intervened under the provisions of Title 28, U. S. C., Sec. 45-a (R. 42).

[7] Title 28, U. S. C., Sec. 47 (Appendix A, p. 4) (R. 52, 66-258).

[8] Title 28, U. S. C., Sec. 47-a (Appendix A, p. 6); Title 28, U. S. C., Sec. 48 (Appendix A, p. 7).

senger, had deprived him of his civil rights under the Constitution of the United States and was made in pursuance thereof, the further claim that this Honorable Court has jurisdiction of this cause is based upon the Civil Rights Act also known as the Enforcement Act.[9]

Constitutional Jurisdiction.

The Constitution of the United States conferred exclusive jurisdiction upon Congress to regulate interstate commerce.[10]

In pursuance of this constitutional provision Congress enacted the Interstate Commerce Commission Act,[11] which act is of a national character and contains a comprehensive national system regulating interstate commerce intended by Congress to operate without favoritism.[12]

---

[9] Title 8, U. S. C., Chap. 3, Sec. 41—Civil Rights (Appendix A, p. 1); Title 8, U. S. C., Chap. 3, Sec. 43—Civil Rights (Appendix A, p. 2).

[10] Article I, Section 8, Cl. 3, United States Constitution (Appendix A, p. 12).

[11] Title 49, U. S. C., Secs. 1-156; the sections pertinent to the issues involved in this case are Sections 1 (1) (2) (5), (Appendix A, p. 7); 2 (Appendix A, p. 8); 3 (1) (Appendix A, p. 8); 4 (Appendix A, p. 8); 13 (1) (4), (Appendix A, p. 9); 15 (1) (2) (Appendix A, pp. 10-11).

[12] See *U. S. et al.* v. *Chicago Heights Trucking Company, et al.*, 310 U. S., 344, 353; *Minnesota Rate Cases*, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151 Ann. Cas., 1916 A-18. *West* v. *Kansas Natural Gas Company*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716; 35 L. R. A. (N. S.) 1193; *Case of the State Freight Tax*, 15 Wall. (82 U. S.) 232; 21 L. Ed. 146; *Texas and Pacific Railroad Company* v. *Interstate Commerce Commission*, 162 U. S. 197, 211, 212. See recent opinion of this Court *U. S.* v. *F. W. Darby Lumber Company, et al.*, No. 82, Oct. Term 1940, Decision Feb. 3, 1941 (Op. 5, 6, 7).

The issues involved in this proceeding necessitated a construction of Article I, Sec. 8, of the United States Constitution, under which the rights of the appellant were alleged to have been violated.[13]

The claim of a violation of his rights under the Constitution and laws made in pursuance thereof, were again asserted in the petition filed in the District Court by the appellant (R. 1-40).

These same constitutional rights of the appellant were again urged in the Assignment of Errors filed in the District Court on this appeal (R. 55-61). In the Statement As To Jurisdiction filed in this Court the appellant again urged that his rights under the Constitution and statutes made in pursuance thereof had been violated by the acts of the defendants.[14]

In the Statement of Points Upon Which Appellant Intends to Rely filed December 2, 1940, in this Court the appellant again urges that his rights under the United States Constitution and laws made in pursuance thereof had been violated (R. 279, 284).

Article VI, Clause 2, United States Constitution, in unambiguous language states that the Constitution and laws of the United States which shall be made in pursuance thereof, etc., shall be the "supreme law of the land."[15]

As a native born citizen of the United States, a resident of the State of Illinois and a Representative in Congress

---

[13] Complaint filed before the Interstate Commerce Commission by the appellant and upon which these proceedings are based (R. 3-7).

[14] See Statement As To Jurisdiction filed in this case, pp. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.

[15] Article VI, Clause 2, United States Constitution (Appendix A, p. 12).

of the First Congressional District of the State of Illinois,[16] the appellant claimed all privileges and immunities of citizens of the several states, while in this interstate journey,[17] claiming a violation of his rights, privileges and immunities secured by the Constitution and laws of the United States and that such violation and deprivation had been brought about under color of the Separate Coach Law of the State of Arkansas and under claim by the defendant, Rock Island,[18] that the discrimination practiced against the appellant, by it, was under color of the Separate Coach Law of Arkansas (R. 178), the District Court had jurisdiction under Title 28, Section 41 (14).[19]

This claim by the appellant that his constitutional rights had been violated by the acts of the defendant, gave rise to a case arising under the Constitution and laws of the United States.[20]

---

[16] Fourteenth Amendment to Constitution of United States, Sections 1, 5 (Appendix A, p. 12).

[17] Article IV, Section 2, Clause 1, United States Constitution (Appendix A, p. 12).

[18] For brevity sake Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway, a corporation, is designated in this brief as the "Rock Island."

[19] See (Appendix A, p. 2).

[20] See *Macon Grocery Company* v. *Atlantic Coast Line Railway Company,* 215 U. S. 501, 506, 507, 508, in which case at page 506 the Court quotes from *Patton* v. *Brady,* 184, U. S. 608, 611 and states "It was said by Chief Justice Marshal that 'a case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either,' *Cohens* v. *Virginia,* 6 Wheat. 264, 379; and again, when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States and sustained by the opposite construction.' *Osborne* v. *Bank of United States,* 9 Wheat.

Jurisdiction by Judicial Interpretation of the Law.

This Honorable Court in a recent decision held that it is imperative that any person who claims that his rights secured by the Interstate Commerce Act have been violated while traveling as an interstate passenger, on a common carrier, must pursue and exhaust his remedies before the Interstate Commerce Commission before applying to the District Court for redress.[21]

The District Court in dismissing the petition of the appellant for lack of jurisdiction, although a negative order, in form was a denial of the rights, privileges and immunities claimed by the appellant and in effect was an affirmative order. Such order and decree is final and appealable directly to this Court.[22]

738, 822. See also *Gold-Washing & Water Company* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257; *White* v. *Greenhow*, 114 U. S. 307; *Railroad Company* v. *Mississippi*, 102 U. S. 135, 139."

[21] *Armour and Company* v. *The Alton Railroad Company*, 293, Oct. Term 1940, Opinion rendered Feb. 3, 1941, in which the Court states (Op. 1) "The ground on which the Circuit Court affirmed was that the issues involved presented administrative problems, necessitating primary resort to the Interstate Commerce Commission. The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion. * * * (Op. 6). The principles making up the so called primary jurisdiction doctrine are well settled. This is obviously a case for their application." See *Loomis* v. *Lehigh Valley Railway Company*, 240 U. S. 43, 48, 50, 51 (1915); *Northern Pacific Railway Company* v. *Solum*, 247 U. S. 477, 483, 484. Title 49 U. S. C., Sec. 13 (1) (4) (Appendix A, p. 9). *Minnesota Rate Cases*, 230 U. S. 352, 419.

[22] *Rochester Telephone Company* v. *United States, et al.*, 307 U. S. 125, 130, 135; *U. S.* v. *Maher*, 307 U. S. 148, 152; *Baltimore & Ohio Railroad Company, et al.* v. *United States, et al.*, 49 S. Ct., 492, 73 L. Ed. 954; 279 U. S. 781, 783; *Manufacturers Railway Company and St. Louis Southwestern Railway Company* v. *United States and Interstate Commerce Commission*, 246 U. S. 457, 456.

A direct appeal to this Court is authorized from the final order and decree entered in this cause by the three Judge Court June 27, 1940.[23]

Statutes Involved.

The statutes involved are so lengthy that for convenience they are included in Appendix A and B of this brief. The constitutional provisions are also included in Appendix A. Request is made that the statutes and the constitutional provisions be read as a part hereof.

The statutes are: Appendix A—

Title 8, U. S. C., Chap. 3, Sec. 41—Civil Rights.
Title 8, U. S. C., Chap. 3, Sec. 43—Civil Rights.
Title 28, U. S. C., Sec. 41, Sub. Div. 14.
Title 28, U. S. C., Sec. 41, Sub. Div. 28.
Title 28, U. S. C., Sec. 43.
Title 28, U. S. C., Sec. 45.
Title 28, U. S. C., Sec. 47.
Title 28, U. S. C., Sec. 47-a.
Title 28, U. S. C., Sec. 48.
Title 49, U. S. C., Sec. 1, Par. 1.
Title 49, U. S. C., Sec. 1, Par. 2.
Title 49, U. S. C., Sec. 1, Par. 5.
Title 49, U. S. C., Sec. 2.
Title 49, U. S. C., Sec. 3, Par. 1.
Title 49, U. S. C., Sec. 4.
Title 49, U. S. C., Sec. 13, Par. 1.
Title 49, U. S. C., Sec. 13, Par. 4.
Title 49, U. S. C., Sec. 15, Par. 1.
Title 49, U. S. C., Sec. 15, Par. 2.

---

[23] Title 28 U. S. C. Sec. 47-47a (Judicial Code, Section 210); *Atchison Topeka and Santa Fe Railway Company, et al.* v. *United States, et al.*, 279 U. S. 768, 770, 49 S. Ct. 494, 73 L. Ed. 947.

The Constitutional provisions are: Appendix A—

Article I, Sec. 8, Cl. 3, United States Constitution.
Article I, Sec. 10, Cl. 1, United States Constitution.
Article IV, Sec. 2, Cl. 1, United States Constitution.
Article VI, Cl. 2, United States Constitution.
Fourteenth Amendment to the Constitution of the United States, Sections 1 and 5.

Appendix B—

Separate Coach Law of the State of Arkansas (Pope's Digest, Chap. XX, Sections 1190 to 1201).

STATEMENT OF THE CASE.

On September 2, 1937, the appellant filed a complaint (R. 1-7) with the Interstate Commerce Commission (hereinafter called the Commission) naming as defendants Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees of the Chicago, Rock Island and Pacific Railway Company (hereinafter called the Rock Island), the Illinois Central Railway Company (hereinafter called the Illinois Central), and the Pullman Company, alleging that the defendants had violated the provisions of the Interstate Commerce Act, Sec. 1, Clause 5 (R. 6), Sec. 2 (R. 4), Sec. 3, Clause 1 (R. 4, 5), and Section 13. (See *Statement of Jurisdiction* pp. 2-7.)

He further claimed that he had been denied the equal protection of the laws under the Fourteenth Amendment. He prayed for a cease and desist order (R. 7).

The acts complained against were alleged to have occurred while the plaintiff was engaged on a continuous interstate journey from Chicago, Illinois, to Hot Springs, Arkansas, as a first-class passenger in interstate commerce holding a first-class railroad ticket for which he had paid

the regular first-class fare (three cents per mile) according to the established and published tariff filed with the Commission by the carriers (R. 3, 4, 5, 6, 7).

The complaint alleged that the defendants were common carriers and subject to the provisions of the Interstate Commerce Act. The specific acts of the defendants were set up in the complaint (R. 3, 4, 5, 6, 7). The defendants answered the complaint (R. 7-9).

The Pullman Company claimed that it had furnished without discrimination, the first-class accommodations to the appellant for which he had paid and that it did not own nor control the inferior accommodations which the appellant was compelled to occupy between Memphis, Tennessee, and Hot Springs, Arkansas, during a part of his interstate journey (R. 8, 9).

The Illinois Central admitted that the plaintiff purchased the first-class round trip ticket from Chicago to Hot Springs from that company and that he paid for it the regular fare charged all other first-class passengers, and that it did furnish to the appellant equal accommodations with all other white passengers holding first-class tickets for this interstate journey while appellant was traveling on the railroad from Chicago to Memphis (R. 8).

The Rock Island admitted the substance of the complaint by the appellant but denied that such acts stated were a violation of the Interstate Commerce Act and the Fourteenth Amendment to the United States Constitution, and further claimed to have acted under the Arkansas separate coach law (R. 7-8).

The undisputed and uncontradicted testimony of the chief witness, Albert W. Jones, a conductor employed on the Rock Island for 32 years, fully sustains the allegations contained in the complaint. An excerpt from the abstract of his testimony is found in R. 36, 37, 38. The testimony

abstracted is found (R. 158-159, 159-160, 162) (R. 163-164, 165, 166, 170, 171, 172, 173). (See "Statement of Jurisdiction," pp. 7, 8, 9.)

A hearing was held before an Examiner of the Commission at Chicago, Illinois, March 7, 1938 (R. 9). The complete transcript of the evidence is contained in the R. 67-213. For the convenience of the Court we have included in the Appendices to Brief for Appellant as Appendix C, appendices pp. 19-50, and the abstract of the evidence contained in the initial brief filed with the Commission and upon which evidence the Commission made its findings.

The testimony of Arthur W. Mitchell, appellant (Appendix C, pp. 19-35); Edward H. Carey, a witness for the appellant (Appendix C, pp. 35-37); William Harrison, a witness for the appellant (Appendix C, pp. 37-39); John J. Pullen, a witness for the appellant (Appendix C, pp. 39-40); Elias A. Morris, a witness for the Appellant (Appendix C, pp. 40, 41); Thomas Price (Appendix C, pp. 33-35).

The separate car law of Arkansas which permitted the carriers to haul sleeping or chair car for the exclusive use of either white or African race separately, but not jointly, was introduced in evidence (Appendix C, p. 41) (R. 127, 211-213) (Appendix B, pp. 15-17).

The defendants offered as witnesses Albert W. Jones, a conductor employed by the Rock Island for 32 years, who had charge of the train between Memphis and Hot Springs at the time of the eviction of the appellant from the first-class accommodations, although the appellant held a first-class ticket and was engaged in an interstate journey (Appendix C, pp. 41, 42, 43, 44, 45, 46, 47, 48, 49); William S. Scott, employed as brakeman for the Rock Island, who testified as a factual witness for the defense

(Appendix C, p. 49). The testimony of A. C. McGuire for the defense is found (Appendix C, pp. 49-50).

The appellant also testified that Conductor Jones, at the time of the ejection of the appellant stated that there "are no first-class accommodations for colored people on this train."

We will not repeat a description of the first-class accommodations as the same have been substantially described in the report of the Commission (R. 22), and the second-class, or "jim crow" car is also fairly described in the report of the Commission (R. 22-23). The Examiner also describes the first-class accommodations for white citizens traveling in interstate commerce (R. 13).

After the Commission had dismissed the complaint, a petition for rehearing and reargument was denied (R. 35). The report of the Commission, including the five dissenting opinions, was filed (R. 18-33). (See *Arthur W. Mitchell* v. *Chicago, Rock Island & Pacific Railway Company*, 229 ICC 703, which contains the finding of fact and conclusions of law.)

April 20, 1939, a petition was filed in the District Court for the Northern District of Illinois, Eastern Division, in equity, as provided by the Urgent Deficiencies Act, Title 28, Section 41 (27) and (28), and Sections 43-48. The petition requested the district Court to set aside, annul, and vacate the order of the Commission. The United States and the three original defendants were made parties to the suit in the District Court and the Interstate Commerce Commission intervened.

Answers were filed. The United States (R. 41), the Interstate Commerce Commission (R. 42-44), the Rock Island (R. 44-45), the Pullman Company (R. 46-50), the Illinois Central (R. 50-52). These same issues were raised by the plaintiff and by defendants as were raised by the Com-

mission. The District Court heard the matter as a three-Judge court and without opinion dismissed the complaint for want of jurisdiction (R. 53). The findings of fact and conclusions of law filed with the order of dismissal are found in this record (pp. 50-53).

An appeal was prosecuted to this Court pursuant to the statute and probable jurisdiction was noted December 16, 1940. The questions presented are contained in our Specification of Errors herein filed.

Specification of Errors.

The final order and decree of the District Court dismissing the petition at the cost of the appellant and sustaining the order of the Interstate Commerce Commission was erroneous and should be reversed for the following reasons:

1. In holding that the separate coach law of Arkansas applied to the appellant who was an interstate passenger and traveling in interstate commerce, is contrary to the plain provisions of the Constitution of the United States, Article I, Section 8, Clause 3; Article IV, Section 2, Clause 1: Article VI, Clause 2; and the Fourteenth Amendment to the Constitution of the United States, and denied to the appellant the equal protection of the laws.

   a. It was contrary to the Interstate Commerce Commission Act passed by Congress in the exercise of its exclusive jurisdiction over interstate commerce. Title 49, U. S. C., Sections 1-156 and in particular, Section 1, paragraphs 1, 2, 5, Section 2, Section 3, paragraph 1, and Section 4.

   b. It was contrary to the laws passed by Congress under the Fourteenth Amendment to the Constitution and known as the Enforcement Act or Civil Rights Act Title 8, U. S. C. Chapter 3, Sections 41 and 43.

c. It was contrary to the decisions of the Supreme Court of the United States which held that the separate coach laws of the several states do not apply to Interstate Commerce. *McCabe* v. *Atchison, Topeka and Santa Fe Railway,* 235 U. S. 151, 35, and cases cited under Point 1 of the argument in this brief.

2. In holding that the common carriers could deny to the appellant, an American citizen of color traveling as an interstate first-class passenger, the equal accommodations and facilities furnished all white persons traveling as first-class interstate passengers on the same continuous journey and who had paid the same rate of fare because the volume of traffic of American citizens of color did not warrant the providing of equal accommodations was a denial of the equal protection of the laws to the appellant in violation of the Constitution of the United States, the laws made in pursuance thereto, and the decisions of this Honorable Court heretofore pronounced. (See above cited authorities.)

3. In sustaining the claim of the defendant Rock Island that it was attempting to follow the separate coach law of Arkansas by the ejection of the appellant from the first-class accommodations afforded by the carrier and occupied by the appellant for part of his interstate journey, was a denial to the appellant of the equal protection of the laws guaranteed by the Constitution and laws of Congress made in pursuance thereof, and contrary to the decisions of this Honorable Court heretofore promulgated. (See authorities above cited.)

4. In holding that American citizens of color traveling in interstate commerce who have paid for first-class accommodations and facilities for a continuous journey were not entitled to the equal accommodations and facilities furnished white citizens traveling as first-class passengers on the same interstate journey solely on the ground of

color denied to the appellant the equal protection of the laws enjoyed by all white citizens and violated his Constitutional rights.

5. In holding that the ejection of the appellant who was traveling in interstate commerce as a first-class passenger and occupying first-class accommodations furnished to all white interstate passengers holding first-class tickets on the same journey, and the failure to furnish the appellant with equal first-class accommodations for his entire journey, and for which he had paid, was unjust and undue discrimination and was contrary to the Constitution and the laws of the United States, the decisions of this Honorable Court, the decisions of the lower Federal Courts, the State Supreme Courts, and the former decisions of the Interstate Commerce Commission and was a denial of the equal protection of the laws to the appellant. Such holding by the District Court was a denial of the due process of law to the appellant.

6. The appellant having contracted with the defendant and paid for first-class accommodations and facilities on an interstate journey, and having been accepted as such first-class passenger for part of the interstate journey, the holding of the District Court that the carrier could eject the appellant from the first-class accommodations and facilities on the sole ground of his race and color was a violation of the Interstate Commerce Act and denied to the appellant the equal protection of the law.

7. In holding that the finding and order of the Interstate Commerce Commission was supported by the evidence when the record shows that the findings and order of the Commission are contrary to the undisputed and uncontradicted evidence of the witnesses for the defendant Rock Island and wholly unsupported by any evidence appearing in the record when the report of the Commission on its face shows that its holdings are contrary to the Constitu-

tion and laws made pursuant thereto, and the decisions of this Honorable Court.

8. In holding that the order of the Commission is supported by the findings when the undisputed evidence in the record shows that the findings clearly show a violation by the defendants of the Constitutional rights of the appellant.

9. In holding that the District Court was without jurisdiction to grant the relief sought in the complaint or any part thereof, and dismissing the complaint when the undisputed evidence contained in the record showed a violation of the Interstate Commerce Act by the defendant, and a violation of the Constitutional rights of the appellant.

SUMMARY OF ARGUMENT.

I.

The Separate-Coach Law of Arkansas was not applicable to the appellant who was a first-class passenger engaged in a continuous interstate journey.

II.

Volume of traffic is no legal defense when a carrier bases its right to refuse first-class accommodations to an American citizen traveling in interstate commerce and who has paid for a first-class ticket entitling him to such accommodations where it appears that all white persons traveling on the same journey and having paid the same rate of fare were being furnished with first-class accommodations by the carrier during their entire journey.

III.

A carrier is not legally justified in ejecting an American citizen of color traveling as a first-class passenger in interstate commerce and who has paid for and been accepted as such first-class passenger for a part of his journey, from the first-class accommodations and compel the interstate passenger to complete his journey in a jim crow car which afforded only second-class accommodations inferior to the first-class accommodations and the carrier's claim that it was attempting to follow or comply with the separate-coach law of a state and disregard the mandate of the United States Constitution and the decisions of the United States Supreme Court, ~~the carrier's claim~~ is without merit.

IV.

Personal Rights—The constitutional right of the appellant was invaded by the defendant, Rock Island, in being wrongfully ejected from first-class accommodations while engaged in a continuous interstate journey and for which first-class accommodations the appellant had paid the regular fare and been accepted as a first-class passenger for part of the journey, the Rock Island by its acts,

(a) violated the Interstate Commerce Act:

(b) breached its contract of carriage with the appellant and disregarded the laws of Congress made to enforce the Fourteenth Amendment of the Constitution and ignored the decisions of this Honorable Court.

V.

American citizens of color have the same rights to contract for first-class service in interstate commerce and when a first-class ticket has been purchased by an American citizen of color he has the constitutional right to be

furnished by the common carrier engaged in interstate transportation of passengers, with first-class accommodations equal to the first-class accommodations by the carrier to all white citizens traveling as first-class passengers in interstate commerce.

VI.

The Interstate Commerce Act is a national comprehensive system and excludes the Arkansas Separate-Coach law from applying to a citizen traveling in interstate commerce.

VII.

Congress has prohibited discrimination, undue prejudice, unreasonable and undue advantage and preference in relation to citizens traveling as interstate passengers.

VIII.

The appellant having suffered direct injury by the conduct of the defendant Rock Island, had the absolute right to begin and prosecute these proceedings.

IX.

Unjust discrimination prohibited by Interstate Commerce Act defined.

X.

Custom does not justify continued unjust discrimination.

XI.

The erroneous holding of the Commission concerning the right of the appellant to purchase and use first-class accommodations in interstate commerce should not be sustained.

XII.

A refund to the appellant for the wrongful violation of his constitutional rights is not adequate redress.

XIII.

The Court will take judicial notice of matters of common knowledge.

XIV.

Questions not involved in this appeal.

XV.

The order of the Interstate Commerce Commission and the decree of the District Court should be reviewed and set aside.

XVI.

Cases which have been cited by defendants in prior stages of this proceeding and which we claim are not in use.

ARGUMENT.

I.

The appellant, an American citizen, was engaged in through interstate travel from Chicago, Illinois, to Hot Springs, Arkansas, as a first class passenger, he having paid a first class fare and the separate coach law of the State of Arkansas was inapplicable to this interstate journey.

The inapplicability of the Separate Coach Law of the State of Arkansas[24] to the continuous interstate journey of the appellant was urged in the Exceptions filed by the appellant to the proposed report of the Examiner.[25]

The complaint alleged that the appellant was a first-class passenger engaged in an interstate journey from Chicago, Illinois, to Hot Springs, Arkansas, and that he had contracted and paid for, at the rates demanded by the defendants a first-class round trip ticket for this interstate journey (R. 3). This fact is undenied and therefore stands admitted.[26]

The proposed report of the examiner also states that the appellant was an interstate passenger.[27]

---

[24] Appendix B, pp. 15-17.

[25] R. 265-266-267, under title "Discrimination and Segregation not Accepted by Complainant."

[26] See answers filed by each of the defendants (R. 7-8) for the Rock Island (R. 8), for the Illinois Central Railroad Co. (R. 8-9), for the Pullman Company.

[27] (R. 10, Statement of Facts), (R. 12-13, Statement of Findings based upon indisputable evidence), (R. 16, "There was no break in complainant's journey at the Tennessee-Arkansas State Line. He was engaged in through interstate travel from Chicago to Hot Springs").

The report of the Commission also supports the continuous interstate journey of the appellant.[28]

The allegation that the appellant was engaged in a continuous interstate journey from Chicago to Hot Springs, was proven by undisputed and uncontradicted evidence.

This Honorable Court in *McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151 at page 60 conclusively settled the question as to the inapplicability of a separate coach law of a state to interstate passengers and at page 160, succinctly and in language which is unambiguous states as follows:

> *Fifth.* "That the act, in the absence of a different construction by the state court, must be construed as applying to transportation exclusively intrastate, and hence did not contravene the commerce clause of the Federal Constitution. *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 590, L. Ed. 784, 785, 2 Inters. Comm. Rep. 801, 10 S. Ct. Rep. 348, *Chesapeake & O. R. Co.* v. *Kentucky*, 179 U. S. 388, 391, 45 L. Ed. 244, 246, 21 S. Ct. Rep. 101; *Chiles* v. *Chesapeake & O. R. Co.*, 218 U. S. 71, 54 L. Ed. 936, 30 S. Ct. Rep. 667, 20 Ann. Cas. 980." • • •
>
> In view of the decisions of this court above cited, there is no reason to doubt the correctness of the first, second, fourth, and fifth of these conclusions."

We believe it can be safely said that all Federal and State Courts, familiar with the doctrine above enunciated by this Honorable Court in the *McCabe* case, *supra*, and which doctrine has been the law applicable to interstate

[28] (R. 29, "There was no break in the complainant's journey at the Tennessee-Arkansas State line. He was engaged in through interstate travel from Chicago to Hot Springs.")

commerce since the days of Chief Justice Marshall, have consistently sustained the same.

It makes no difference whether the highest court of the state has passed upon the applicability of a state statute and construed it as applying only to intrastate commerce because the decisions of this Honorable Court are final on all matters involving federal questions.

This *Honorable Court in McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 59 L. Ed. 169, 35 S. Ct. 69, 70, adopts as the law the conclusions of the Circuit Court of Appeals for the Eighth Circuit,[29] in its statement of the law concerning the non-application of a separate coach law to passengers traveling in interstate commerce.

We think it is well to consider the opinion of Circuit Judge Adams, of the Eighth Circuit, in his treatment of the well settled principles of law concerning the non-applicability of a state statute to citizens traveling in interstate commerce (186 F. 966) at page 972:

> "(5) Is this statute an invasion of the exclusive prerogatives of Congress over interstate commerce?
>
> It may be conceded that, if it applies to interstate transportation, it is a regulation of interstate commerce within the meaning of the Constitution. We think this follows from the doctrine laid down by the Supreme Court in *Hall* v. *De Cuir*, 95 U. S. 485, 24 L. Ed. 547. In that case a law of Louisiana as interpreted by its highest judicial tribunal required carriers of interstate commerce when operating within the limits of the state to receive colored passengers into cabins set apart for white persons. The court said:

[29] (C. C. A. 8, 186 Fed. 966, 972), (109 C. C. A. 110.)

'It (the statute) does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within.'

This, it was held, interfered directly with the freedom of interstate commerce, and therefore encroached upon the exclusive power of Congress. See, also *Louisville, etc., Ry. Co.* v. *Mississippi*, 133 U. S. 587, 590, 10 S. Ct. 348, 33 L. Ed. 784, and *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 391, 21 S. Ct. 101, 45 L. Ed. 244.

For like reasons, the Oklahoma law, if, as properly construed, it embraces or relates to interstate commerce at all, would also be a regulation of that commerce. It compels carriers when operating in that state to exclude colored persons from cars or compartments set apart for white persons. The only difference between the Louisiana and the Oklahoma law is that the one compels carriers to receive into and the other to exclude colored persons from cars or compartments carrying white persons. They act alike directly upon the carrier's business as its passengers cross the state line. Hence, if one is a regulation of interstate commerce, the other must be. The contention, therefore, that the provisions of the Oklahoma statute do not amount to a regulation of interstate commerce, if they concern that commerce at all, is untenable."

The Court was considering the proviso to Section 7, that part of the Separate Coach Law of the State of Oklahoma, which is identical in substance, with the section of the Arkansas Separate Coach Law now under considera-

tion, both of which operate the regulation of sleeping cars and other first-class accommodations within the states.[30]

The decisions of this Honorable Court were presented to the Examiner[31] and to the Commission.[32] These decisions were commented upon by the Commission in its report,[33] but were misunderstood by the Commission as shown by the misapplication of the law to the facts in the case at bar.

This Honorable Court in *Hines, etc., et al.* v. *Benard Davidowitz, et al.*,[34] held that the Alien Registration Act[35] was a comprehensive plan enacted by the Federal Government and operated on all aliens within jurisdiction of the United States; that all previous local state laws concerning the registration of aliens, yielded to the Act of Congress and were no longer applicable to the subject of

---

[30] The Oklahoma Statute, proviso to Section 7, is recited 186 Fed. 966-970 and is as follows:

"Provided that nothing herein contained shall be construed to prevent railway companies in this state from hauling *sleeping cars, dining or chair cars* attached to their trains, to be used exclusively by either *white* or *Negro* passengers, separately, but not jointly. Laws 1907-1908, c. 15."

Separate Coach Laws of Arkansas, Appendix B, pp. 15-17, is as follows:

1193 "Separate sleeping and chair cars. Carriers may haul *sleeping or chair cars* for the exclusive use of either the *white* or *African* race separately, but not jointly" (R. 126).

[31] See Exceptions on behalf of plaintiff to report proposed by Examiner (R. 260-279 particularly page 265, under title, Discrimination and Segregation are not Accepted by the Complainant).

[32] By Petition for Rehearing and Reargument filed by the appellant.

[33] See (R. 24, 25).

[34] No. 22, Oct. Term 1940, Opinion Jan. 20, 1941.

[35] Public Act No. 670, 76th Congress, 3rd Sess., c. 439.

which Congress had been given power to act under the Constitution.

We believe that this Honorable Court had in mind the comprehensive system governing national transportation enacted by Congress and known as the Interstate Commerce Act, when holding in the various cases heretofore decided by this Court, that local separate coach laws of the various states were not applicable to American citizens traveling in interstate commerce.

The necessity for exclusive jurisdiction to regulate interstate commerce was recognized by Hamilton as early as 1783, in his resolutions for a general convention.[36]

We believe the Commission overlooked the law concerning separate coach laws of the several states in relation to Interstate Commerce and has misunderstood the provision of the complainant in relation thereto. On page 12 of the report (Par. 2) it is stated (R. 27):

> "At the hearing complainant stated that segregation was not involved and apparently for the purposes of this case he accepted it, regarding the Arkansas statute as requiring it in that State for all passengers, both interstate and intrastate."

The appellant does not wish to be understood as accepting segregation in Interstate Commerce under any state law as the Constitution of the United States (Fourteenth Amendment) and the laws enacted to enforce the provisions of the same, prohibits any state from denying to any citizen, white or black, the equal protection of the

---

[36] The Federalist, Hamilton in 1783, Page 6, Par. ~~Eighty,~~ Eightly and again by Madison in 1788, Federalist Paper No. 42, 'General View on Powers Proposed to be Vested in the Union,' page 332. "The powers included in the *third class* are those which provide for the harmony and proper intercourse among the states." See p. 333.

laws and prohibits any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. The Enforcement Act passed by Congress provides that all citizens black and white are entitled by law to the same rights, privileges and immunities in every state, and any law of any state which denies to a black citizen the same protection of the law received by a white citizen is in conflict with the Constitution and laws of the United States. No self respecting white citizen, we believe would accept segregation solely on account of his color or race and the same applies to any self respecting black citizen.

It would be contrary to the decisions of the Supreme Court to accept the Arkansas separate-coach law or any other separate-coach law as applying to passengers traveling in Interstate Commerce.

We believe the Commission disregarded the law as laid down by the Supreme Court of the United States and consistently followed by all Federal Courts which hold that, "the Separate Coach Laws of the several States do not apply to interstate commerce," and follow the two decisions from the State of Tennessee and Mississippi, and which have not been followed nor approved by other jurisdictions.

The Supreme Court of Maryland, in *Hart* v. *State*, 60 Atl. 457, 463, 100 Md. (March 22, 1905), refused to follow *Smith* v. *Tenn., supra,* after stating that the Supreme Court of the United States on analogous questions had held to the contrary.

Mr. Justice Boyd in a well rendered decision, reviews many authorities and concludes that the Separate Coach Law of Maryland was invalid as to interstate passengers under the Commerce Clause of the Federal Constitution.

The opinion quotes Mr. Justice Miller of the United States Supreme Court which is as follows (p. 461):

> "In *Railway Company* v. *Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, Justice Miller, after stating that in the cases of *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77; *C. B. & Q. RR.* v. *Iowa*, 94 U. S. 155, 24 L. Ed. 94, and *Peik* v. *Chicago & N. W. R. R. Co.*, 94 U. S. 164, 24 L. Ed. 97, some questions did not receive full consideration, said, in the headnotes prepared by him: 'Notwithstanding what is there said, this court holds now, and has never consciously held otherwise, that a Statute of a State intended to regulate or to tax, or to impose any other restriction upon, the transmission of persons or property or telegraphic messages from one State to another is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the State.' In that case the court quoted at length from the opinion in *Hall* v. *DeCuir*, 95 U. S. 485, to sustain the doctrine announced."

Hart v. *State of Maryland*, 100 Md. 595, 60 Atl. 457, is identical with the case at bar.

In *Huff* v. *Norfolk & Southern Ry. Co.*, 88 S. E. 344, 345, 171 N. C. 203 (March 22, 1916), the Supreme Court of North Carolina refused to follow the *Smith* v. *Tenn.*, *supra*, and followed the decisions of the Supreme Court of the United States. Mr. Justice Hoke in delivering the opinion of the court states (p. 205):

> "While there is learned and forcible decision to the contrary, *Smith* v. *Tenn.*, 100 Tenn. 494, it seems to be the trend of opinion and the decided intimation of the Supreme Court of the United States on the

subject that State Legislation of this character may not extend to a case of interstate traffic. *C. & O. R. R.* v. *Ky.*, 179 U. S. 288; *Plessy* v. *Ferguson*, 163 U. S. 537; *Hall* v. *DeCuir*, 95 U. S. 485; *Anderson* v. *L. & N. Ry.*, 62 Fed. 46; *State ex rel. Abbot* v. *Hicks*, 44 La. Criminal."

A careful search of Shepard's S. W. Reporters Citations and Shepard's Southern Reporters Citations fail to disclose that the *Smith* v. *Tenn., supra*, and *Southern Ry. Co.* v. *Norton, supra*, cited by the defendants have been followed or approved. The United States Supreme Court having stated the law in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169, by a full court in 1914, which decision must have been overlooked by the Mississippi Supreme Court in 1916, when it decided the *Southern Ry. Co.* v. *Norton, supra*, contrary to the decision of the United States Supreme Court rendered two years previous.

In *Wabash, St. Louis and Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557, 573, 575, 576, 577, this Honorable Court in holding that the exclusive jurisdiction over Interstate Commerce was placed by the Constitution in Congress states:

(p. 573):

"The argument in this subject can never be better stated than it is by Chief-Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, 196. He there demonstrates that commerce among the states like commerce with foreign nations is necessarily commerce which crosses state lines and extends into the states, and the power of Congress to regulate it exists wherever that commerce is found."

(p. 575):

"We must, therefore, hold that it is not and never has been a deliberate opinion of the majority of this

court that a statute or a state which attempts to regulate the fares and charges by a railroad company within its limits for a transportation which constitutes a part of commerce among the states is a valid law."

This doctrine is supported by numerous cases decided by this Court by an unbroken line of decisions.[37]

Repeated decisions of this Court have determined that the power to regulate commerce embraces all the instruments by which such commerce may be conducted; and it is settled law that when the state to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. Whatever subjects of this power says Mr. Justice Curtiss, are in their nature na-

---

[37] *Gibbons* v. *Ogden*, 9 Wheat. 1, 211; in which Chief Justice Marshall delivered an opinion which has been followed by this Honorable Court to the present time;

Hall v. *DeCuir*, 95 U. S. 485, 488, Mr. Chief Justice Waite states: "But we think it may safely be said that the state legislature which seeks to impose a direct burden upon Interstate Commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion occupies that position. It does not act upon the business through the local instruments to be employed after (489) coming within the state, but directly upon the business as it comes into the state from without or goes out from within.

While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.

His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within and sometimes those taken up and put down without." (See Concurring Opinion by Mr. Justice Clifford—pp. 491, 495, 497.)

tional, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. Mr. Justice Clifford in *Hall* v. *De Cuir*, 95 U. S. 485 at page 497. He cites *Cooley* v. *Board of Wardens*, 12 How. 299.[38]

We believe a further extended argument on this point to be unnecessary as this Honorable Court has recently sustained the doctrine contended for by the appellant, *i. e.*, that state laws are inapplicable to interstate commerce under the condition shown by the record in the case at bar.[39]

a. A Case in Point.

The United States Circuit Court of Appeals for the District of Columbia has rendered a decision in a case which we believe to be in point. *Washington, B. & A. Electric R. Co.* v. *Waller*, 289 F. 598, 600 (C. C. A. D. C. May 7, 1923).

---

[38] Case of the State Freight Tax, 15 Wall. 232 (82 U. S.), 21 L. Ed. 146. Wherever the ~~states~~ over which the power to regulate commerce is ~~assertion~~, or in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress.

Surely, transportation of passengers or merchandise through a state or from one state to another is of this nature.

See Minn. Rate case 230 U. S. 352, 33 Sup. Ct. 729; 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916 A 18;

Haskell v. *Cowham*, 187 Fed. 403, 408, 109 C. C. A. 235, 240;

West v. *Kansas, National Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193.

[39] The *U. S. of America* v. *Appalachian Electric Power Co.* Opinion Dec. 16, 1940, No. 12, Oct. Term 1940, S. Ct. of the U. S., *Lewis G. Hines, Secretary of Labor, et al.* v. *Benard Davidowitz, et al.*, Opinion Jan. 20, 1941, No. 22 Oct. Term 1940, U. S. Supreme Ct. See *U. S.* v. *F. W. Darby Lumber Co.* Opinion rendered Feb. 3, 1941, No. 82, Oct. Term 1940.

In *Washington, B. & A. Electric R. Co.* v. *Waller,* 289 Fed. 598, 600 (C. C. A. D. C. May 7, 1923), a colored citizen had purchased a round trip ticket from Washington, D. C., to Annapolis, Maryland, on his return he was ejected by the conductor of the company, who claimed that the Maryland Statute requiring segregation of white and colored passengers applied to an interstate passenger. A judgment recovered in the District Court was affirmed by the Court of Appeals and Mr. Justice Barber in delivering the opinion of the court of appeals states (p. 600):

> "We think that the appellee was an **interstate passenger**, and that the Maryland Statute requiring segregation of white and colored passengers was not applicable to him. *The Daniel Ball,* 10 Wall. 557, 19 L. Ed. 999; *So. Pac. Ry. Co.* v. *I. C. C.,* 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310; *R. R. Comm. of La.* v. *T. & P. Ry. Co.,* 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215; *Chiles* v. *C. & O. R. R. Co.,* 218 U. S. 71, 30 S. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980; *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23; *Hall* v. *DeCuir,* 95 U. S. 485, 24 L. Ed. 547; *Railway Co.* v. *Mississippi,* 133 U. S. 587, 10 S. Ct. 348, 33 L. Ed. 784.
>
> In *Hart* v. *State of Maryland,* 100 Md. 595, 60 Atl. 457, the court made an exhaustive examination of the authorities, state and federal, and in an able opinion concluded that a Maryland statute apparently enacted prior to the one invoked here, but of similar import, providing for the segregation of white and colored passengers, while valid so far as it affected commerce wholly within the state, was invalid as to **interstate passengers**, as in conflict with that part of Article I, Section 8, of the Constitution of the United States, known as the Commerce Clause."

II.

VOLUME OF TRAFFIC.

The contention by the defendants that the rights of the appellant to first-class accommodations and facilities, during his journey as an interstate passenger, to equal accommodations and facilities furnished all other first-class interstate passengers traveling on the same journey and having paid the same fare as the plaintiff depends upon the volume of traffic is without merit.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161, 162 (1914), 59 L. Ed. 169, 35 S. Ct. 69, this honorable Court conclusively set at rest the contention of all common carriers, subject to the Interstate Commerce Act that volume of traffic determined the kind of service to be rendered interstate passengers and held that the argument with respect to the volume of traffic to be without merit. Contrary to this decision of this Honorable Court the Commission on p. 8, par. 1 of its report (R. 24) states[40]

In view of the undisputed and uncontradicted testimony of Albert W. Jones, the conductor on the Rock Island for 32 years and a witness for the defendant, Rock Island as abstracted (R. 36, 37, 38), it is obvious why he had received little or no requests from citizens of color for first-class

[40] Only about 1 Negro to 20 white passengers rides this train from and to points on the line between Memphis and Hot Springs, and there is hardly ever a demand from a colored passenger for Pullman accommodations; the conductor recalled but 10 or 12 instances, in the past 32 years of his service on the train, wherein colored passengers who had entered Pullman cars were required by him to move into the colored passenger coach. He estimated that the demand for Pullman accommodations did not amount to one per year. What demand there may have been at ticket offices does not appear.

accommodations, although they held first-class tickets and were traveling as interstate passengers. The contention concerning the volume of traffic as the basis for a failure to furnish citizens of color with first-class accommodations in interstate commerce was made by the state of Oklahoma.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, in which case the Circuit Court of Appeals for the 8th Circuit had sustained the argument concerning the volume of traffic as a basis for the services and accommodations to be rendered interstate passengers of color, (*McCabe* v. *Atchison R. & S. F. Ry. Co.*), it is significant that the section of the Oklahoma Statute under consideration by the Circuit Court of Appeals,[41] is identical with Section 1193 of the Arkansas Separate Coach Law now under consideration by this honorable Court.[42]

Judge Sanborn, one of the Circuit Judges of the 8th Circuit rendered a dissenting opinion (*McCabe* v. *Atchison T. & S. F. Ry. Co.*, 186 F. 966 beginning at p. 977 and ending p. 989), which dissenting opinion we believe to have been adopted by this Court concerning the volume of traffic. In the *McCabe* case, *supra*, the Attorney-General of the State contended that the volume of traffic did not warrant the furnishing by the common carrier, of first-

[41] The Oklahoma Statute, Section 7, is as follows:

"Provided that nothing herein contained shall be construed to prevent Railway companies in this state from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or Negro passengers, separately, but not jointly, Laws 1907-08, c. 15."

[42] Section 1193, Separate Coach Law of Arkansas, Appendix B., pp. 15-17, is as follows:

"Separate Sleeping and Chair Cars.—1193. Carriers may haul sleeping or chair cars for the exclusive use of either the white or African race separately but not jointly."

class accommodations to colored passengers paying first-class fares and traveling in interstate commerce. Mr. Justice Hughes, delivering the opinion of this Court states, pp. 160, 161:

"With the third[43] relating to Sec. 7 of the statute we are unable to agree. It is not the question that the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and *provide no similar accommodations for Negroes.* The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the attorney general of the state, in the brief, filed by him in support of the law, urges that 'the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or, sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not, by law, compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility.' And in the brief of counsel for the appellees, it is stated that the members of the legislature 'were undoubtedly familiar with the char-

[43] That the provision of Sec. 7 above quoted, relating to sleeping cars, dining cars and chair cars did not offend against the 14th Amendment as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other. *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.,* 151, 160.

acter and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the interstate travel' in that state.

This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, *substantial equality of treatment of persons traveling under like conditions cannot be refused.* It is the individual who is entitled to the equal protection of the laws and if he is denied by a common carrier, acting in the matter under the authority of a state law, the facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler he may properly complain that his constitutional privilege has been invaded."

In view of the undisputed evidence (R. 36, 37, 38) given by the witness Jones on behalf of the Rock Island, clearly showing a course of unjust, undue and unlawful discrimination covering a period of the 32 years he has been in charge of this particular Rock Island train, against American citizens of color traveling as interstate passengers and having paid first-class fares, we are unable to reconcile that part of the report of the Commission, which was approved by the decree of the District Court,[44] in view of

[44] See R. 24, par. 1, Sheet 8 of the report of the Commission.

the decision of this Honorable Court in *McCabe* v. *Atchiso T. & S. F. Ry. Co.*, 235 U. S. 151, 160, 161, which held tha the argument with respect to volume of traffic is witho merit.

This Honorable Court in *Buchanan* v. *Warley*, 245 U. S 60, 74, 75, 76, 77, 78, 79, 80, 38 S. Ct. 16, (1917) denounce the practice of discrimination against American citizen solely on account of race and color and in the decision o this Court delivered by Mr. Justice Day, in holding a ordinance void which discriminated against America citizens of color at p. 74 states (245 U. S. 60):

> "The Federal Constitution and laws passed withi its authority are by the express terms of that instru ment made the supreme law of the land. The Fou teenth Amendment protects life, liberty, and propert from invasion by the states without due process o law."

The opinion reviews the various cases decided by th Supreme Court and the enactment by Congress of law for the protection of the civil rights of persons of colo under the Fourteenth Amendment.

The Court further states (p. 75):

> "Following the Civil War certain amendments t the federal Constitution were adopted, which have become an integral part of that instrument, equally binding upon all the states and fixing certain funda mental rights which all are bound to respect. • • • The Fourteenth Amendment made all persons born or naturalized in the United States citizens of the United States and of the states in which they reside, and provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no state shall deprive any person of life, liberty, or property

without due process of law, nor deny to any person the equal protection of the laws."

(Pages 76, 77):

"The reasons for the adoption of the amendments were elaborately considered by a court familiar with the times in which the necessity for the amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment. * * * It (the Fourteenth Amendment) was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. * * *"

We ask with sincerity if this Honorable Court would say that a white citizen of the United States subjected to the same treatment as the complainant in this case would not be unjustly discriminated against? We further ask if the constitution and the laws made pursuant thereto can be disregarded with impunity.

To further demonstrate the justness of the decision of the Supreme Court in the *McCabe* case, *supra*, we call to the attention of this Honorable Court ~~to~~ a further quotation from *Buchanan* v. *Warley*, *supra*, (p. 77):

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks

> in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution."

We do not believe it can be successfully contradicted that, every white citizen holding a first-class ticket is allowed to enjoy the accommodations furnished by the Rock Island Railroad for first-class passengers. They are permitted and invited to enjoy the accomodations of the Pullman car, observation car, parlor car, and dining car upon paying the additional rate. If the Fourteenth Amendment to the Constitution of the United States and the laws made pursuant thereto mean what they say then persons of color are entitled, under like circumstances, to like accommodations and the denial by the common carrier claiming justification for such denial under the excuse that the volume of traffic does not permit it to comply with the plain provisions of the law, conflicts with the Constitution and amounts to unjust discrimination.

The Court in *Buchanan* v. *Warley, supra* further states (p. 78):

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, etc." (Laws of 1870, Chapter 114, Paragraph 16, 16 Stat. 144, Comp. St. 1916, Paragraph 3925.)

In the face of these constitutional and statutory provisions, we contend that no white person could be sub-

jected to the same treatment as was received by the complainant without such conduct on the part of the common carrier amounting to unjust discrimination, undue preference and a violation of his constitutional rights. This being true, then a person of color who is given by law the identical rights of the white person cannot be subjected to the treatment given to the complainant in this case without suffering the same consequences.

In *Buchanan* v. *Warley, supra*, the Court in approving and reaffirming the doctrine laid down in the *McCabe* case, *supra*, at page 80 states:

> "In the recent case of *McCabe* v. *Atchison, etc., Ry. Co.*, 235 U. S. 151 (35 Sup. Ct. 69, 59 L. Ed. 169), where the court had under consideration a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish dining cars altogether for colored persons, this language was used in reference to the contentions of the Attorney General: 'This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. * * *"

We believe the Commission and the District Court overlooked the principal provisions of the opinion expressed in the *McCabe* case, *supra*, and further overlooked the fact that the undisputed evidence in the case at bar shows that there are no first-class accommodations provided for colored passengers holding first-class tickets, in the dining car, in the observation-parlor car although such accommodations are furnished to white passengers paying the same fare. This Commission on page 8, Paragraph 2, states that no such first-class accommodations were fur-

nished to colored persons, but on the contrary were denied to colored persons solely on account of their color. This is a plain violation of the Constitution and laws of the United States and is within itself unjust discrimination and undue preference.

On page 8, Paragraph 2 (R. 24) the report states:

> "The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, **but there are no dining-car nor observation-parlor car accommodations for the latter and they can not lawfully range through the train.**"

The undisputed evidence in the case at bar shows that white persons traveling in interstate commerce, and holding first-class tickets, are permitted to purchase berths and seats in the Pullman and observation cars, but on the contrary, colored persons holding first-class tickets and traveling as interstate passengers are only permitted to purchase a seat and a berth in the drawing room, if the drawing room is not occupied by white passengers (R. 38). Conductor Jones stated that he had never sold any first-class accommodations and observation-parlor cars to colored passengers (R. 37, 38) although they held first-class tickets. He further stated that he did not permit a colored person to ride in any other place than the jim crow car although adequate space was vacant in (R. 36, 38) the Pullman car and observation car, and that in 32 years he had never permitted a colored person to even occupy a seat in the drawing room, when they applied to him for such accommodations, but removed them to the jim crow car (R. 38).

The doctrine which was so forcibly and clearly expressed by this Honorable Court in the *McCabe* case, *supra*, was

again expressed in State of Missouri, at the relation of *Lloyd Gaines, Petitioner* v. *S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri,* 305 U. S. 337, 350, in which case it was contended that, "the limited demand for the legal education of Negroes was a legal excuse for the discrimination by the State of Missouri in favor of white persons." The Supreme Court adhered to its former holdings, in the *McCabe* case, *supra,* and stated (p. 350):

"Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. We had occasion to consider a cognate question in the case of *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co., supra.* There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by negroes justified the State in permitting the furnishing of such accommodations exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right 'depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly com-

plain that his constitutional privilege has been invaded.' *Id.*, pp. 161, 162.

> "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the state was bound to furnish him within its borders facilities for legal education substantially equal to those which the state there afforded for persons of the white race, whether or not other negroes sought the same opportunity."

We submit that the decisions of this Honorable Court above discussed clearly showed that the findings of the Commission and the decree of the District Court, in the case at bar do not harmonize with the same. The provisions of the United States Constitution and the laws of Congress above quoted, concerning the equal rights of all citizens of the United States, apparently have been overlooked by the Commission and the District Court.

The Commission on sheet 10 of the report, (Par. 2, R. 26) states:

> "Complainant contends that the extent of the demand for first-class accommodations for colored passengers has no bearing on the question presented."

We submit that the above discussed decisions by this Honorable Court fully sustain the contention of the appellant. It is further contended that the plain provisions of the Supreme law of the land, the Constitution, having declared that "the immunities of citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (U. S. Const. Art. 4, Sec. 2, Clause 1). We submit that the Commission and District Court were bound by the plain provisions of the Constitution.

The Commission on page 12 of the report (Par. 1, R. 27) states:

> "Defendants say that what the Court evidently meant by this comment was that a carrier could not absolutely refuse to afford colored passengers Pullman accommodations, but had to provide them if there was a reasonable demand for colored passengers."

We have shown by the decisions of the Supreme Court that the right to Pullman accommodations does not depend upon the volume of traffic, but that the right is an individual one, therefore we will not extend this discussion.

The Commission states on page 12 the following:

> "In any event, we are not here considering a Constitutional question, but rather questions of the act."

This statement presents rather a novel situation. All officers of the United States, as we understand, by their oath, to uphold the Constitution of the United States and all laws made pursuant thereto are duty bound to condemn any act whether committed by a state or an individual, contrary to the provisions of the Constitution, without regard to the nature of the proceeding in which the question arises. The very existence of the power and authority of Congress itself is contained in the Constitution (Art. 1, Sec. 8, Clause 3) which gives to Congress exclusive jurisdiction over Interstate Commerce, *Hall* v. *DeCuir*, 95 U. S. 485.

Under this Constitutional power Congress enacted the Interstate Commerce Act by which this Commission derives its power. For the Commission and the District Court to refuse or fail to uphold the Constitution and the plain provisions thereof, leaves the citizens without redress through the administrative governmental agency provided

by law, and we submit that the facts in the case at bar clearly show that the rights guaranteed to citizens of color by the Constitution and the laws of the United States have been denied to a citizen of color and that such denial violates the provisions of the Constitution and amounts to unjust and unlawful discrimination as a matter of law and fact.

The report of the Commission (sheet 12, Par. 2, R. 27), states:

> "Volume of traffic is an important consideration in determining whether certain services demanded are warranted and whether a difference in treatment is justified."

This statement seems to indicate that the Commission, disregarded the decisions of this Honorable,[45] and the District Court in dismissing the petition of the appellant did likewise. This Honorable Court in *Hines, et al.* v. *Davidowitz, et al.*, No. 22, October Term 1940 (Opinion January 20, 1941) states:

> "And it is also of importance that this legislation deals with the rights, liberties and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."

The conclusion of the Commission that volume of traffic is an important consideration in determining the kind of treatment an American citizen is to receive in interstate

---

[45] *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, 160, 161; *Buchanan* v. *Warley*, 245 U. S. 60-80; *Gaines* v. *Canada, et al.*, 305 U. S. 337, 350, 351, which hold, that volume of traffic in the transportation of American citizens in interstate commerce is not to be considered.

commerce seems to be in conflict with the basic principles of American jurisprudence.

In *United States* v. *Chicago Heights Trucking Co., et al.*, 310 U. S. 344, 351, 352, (1939) this Honorable Court again sustains the doctrine that, the volume of traffic did not authorize an inequality of treatment on rates for substantially similar services in interstate commerce.

III.

The claim by the defendant, Rock Island, that it was attempting to follow the Separate Coach Law of Arkansas and disregard the plain provisions of the Constitution of the United States, and the laws made in pursuance thereof is untenable and the report of the Commission shows its misconception of the law.

The Commission in its report (R. 27-29) again erroneously assumes that the parties in the case at bar, assumed that the Arkansas statute was applicable to interstate traffic. It would be a rash assumption for any citizen, at this late date, to assume that which the highest court in the land has decided and settled definitely the law as being to the contrary. No citizen can be justified in assuming that the Arkansas statute applied to interstate commerce in view of the unambiguous language used by the Supreme Court in the various decisions above quoted which holds the contrary.

The Commission (R. 28) states:

> "What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute."

It is respectfully contended that in view of the decisions of the United States Supreme Court, the Constitution of the United States, and the laws made by Congress for the enforcement of the Fourteenth Amendment,[46] that an assumption by a common carrier to comply with a statute of a state which he knew or ought to have known was not applicable to interstate commerce, and where such practice was in violation of the plain provisions of the Constitution would show an utter disregard for the supreme law of the land and the decisions of the highest tribunal. The practice of discrimination against any citizen of the United States, solely on account of color, should be condemned by the Commission. Such practice of discrimination on account of color or race violates the plain provisions of the Interstate Commerce Act, the very act which this Commission was created to enforce, and such discrimination should not be tolerated by any law enforcing agency.

There is no contention by the carriers, in the case at bar, that they were relying upon any such practice as they well knew or ought to have known, that unjust discrimination against a citizen of the United States, solely on account of his color or race, is prohibited by the laws, not only of the United States, but of all God-fearing and liberty loving persons. To permit such practice to continue, as shown by the record in the case at bar, is to reduce to mere words the provisions of the Constitution of the United States, the laws made by Congress prohibiting such practice, and the decisions of the Supreme Court of the United States, which condemned such practice as unjust, unlawful and unAmerican. We do not believe this Court will further permit such discrimination to continue.

---

[46] (Title 8, U.S.C., Secs. 41-43).

A colored American citizen paying a first class fare and traveling as a passenger in interstate commerce is entitled to any and all first class services, facilities and accommodations which are furnished on the same journey to white citizens paying a first class fare.

IV.

PERSONAL RIGHTS.

The undisputed and uncontradicted testimony in the record of all witnesses testifying to matters material to the issues involved conclusively shows that the personal constitutional rights of the appellant were ruthlessly violated.

It is undisputed and all evidence bearing on the question is uncontradicted, that the appellant is an American citizen, member of the Congress of these United States and was a first-class passenger engaged in an interstate journey at the time he was ejected from the first-class accommodations for which he had paid and received during part of his journey. This Honorable Court in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151 at pp. 161-162 states:

> "It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a State law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may *properly* complain that his constitutional right has been invaded."

In the case at bar the constitutional rights of this citizen were openly violated by the common carrier under

the claim that it was acting in the matter under the authority of the Separate-Coach Law of Arkansas.[47]

In treating this subject, Judge Sanborn in his dissenting opinion states the law, which it is submitted out of justice and fair play to the American citizen of color should be applied in the case at bar.[48]

He further states that no separate chair cars, sleeping cars, or dining cars are required to enable a common carrier, engaged in interstate commerce to give all citizens equal comforts and conveniences of travel (168 Fed. p. 978). He further held that the constitutional rights of citi-

---

[47] See proposed report of Examiner (R. 10-17); report of I. C. C. (R. 18-33). See dissenting opinion of Commissioner Eastman (R. 30), which states:

> "The facts are that white passengers were and are given adequate opportunity to obtain seats, berths, compartments, or rooms in Pullman cars, together with the right to use any dining car or observation car that may be attached to the train, whereas colored passengers have no opportunity to obtain seats or berths in the body of the car or to use dining or observation cars, but may obtain accommodations in a compartment or room, provided one can be found that has not been previously taken by a white passenger. If the conditions were reversed, I cannot believe that the white passenger would regard this as equality and opportunity" (229 I. C. C. p. 712). Evidence of Albert W. Jones, witness for the defendants (R. 36-38).

[48] *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 168 Fed. 966, p. 978:

> "As I understand the fourteenth amendment to the Constitution, the purpose of its enactment, its express terms, and its legal effect are to prohibit the conditioning of the privileges and immunities of citizens and the equal protection of the laws by the respective conditions and circumstances in which citizens may find themselves, and to secure to those suffering under adverse conditions and unfavorable circumstances the same civil rights and the same protection of the laws

zens to their privileges and immunities and to the equal protection of the laws are not dependent upon the expense and inconvenience of maintaining separate coaches and compartments for the two races although such items are worthy of serious consideration by the States when enacting laws compelling railroads to provide separate coaches (p. 978). He further illustrates how unjust and un-American it is to deny citizens of color the equal accommodations and facilities furnished to white citizens in the use of dining cars and sleeping cars.

IV-A.

Personal rights include personal liberty.

"Personal Liberty" constitutes any power of locomotion of changing situation or removing one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. 1 Bl. Com. 134, *Plessy* v. *Ferguson*, 163 U. S. 537. (Dissenting Opinion, Mr. Justice Harlan, p. 557:) The equal protection of the laws as used in the Fourteenth Amendment to the Constitution of the United States, is meant equal security under the laws to everyone in similar terms —in his life, his liberty, his property and in the pursuit

---

that the more fortunate and prosperous enjoy. Citizenship and citizenship alone, under this amendment to the Constitution, entitles every man, white or black, to all his civil rights and privileges unabridged by the action or legislation of any state and to the equal protection of all the laws. Before the law, by the express terms of the fourteenth amendment, all citizens are equal in their civil rights, and the humblest is the peer of the most powerful. It regards a citizen as a citizen, and takes no account of his surroundings or of his color when his civil rights, as guaranteed by this the Supreme law of the land, are involved."

of happiness. *In Re Grice,* 79 F. 627, 628, in which case it is also held (p. 641), that one of the most sacred rights of liberty is the right of contract, and that all of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the Constitution of the United States and that such sacred rights are not capable of being restrained by legislative action of any state (Fourteenth Amendment, United States Constitution), nor by any person claiming to act under color of any law of the state (Title 8, U. S. C. Chap. 3, Secs. 41 & 43). It was further held in the *Grice* case, *supra* that a man may form business relations with whom he pleases and in the conduct of such business, they may fix and limit the character and amount of their business, the price they will charge for the products which they offer to the public, or by which they contract. And it is part of the natural and civil liberty to form business relations free from the dictation of the state. It was further held in the *Grice* case, *supra,* that whatever the state does, it cannot deprive one within its jurisdiction of the equal protection of the laws and by equal protection of laws, is meant equal security under them, under similar terms in the citizen's life, liberty, property and in the pursuit of happiness. It not only implies the right of each citizen to resort, in similar terms with others, to the courts of the country for the security of his person, and property, for the redress of wrongs against him and the enforcement of his contracts, but also his exemption from any greater burden and charges within the state as are equally imposed upon all other citizens under like circumstances. *In Re Grice,* 79 F. 627.

All American citizens, whether white or colored, are entitled to equality before the law. This equality is secured by the Constitution of the United States and the

laws made by Congress in pursuance thereof and the subject of equality before the law, is the fundamental principle of English and American liberty.[49]

V.

Personal rights include the equal protection of the laws and the right to contract for first-class services, accommodations and facilities in Interstate Commerce and further includes the right to enforce the contract in the event of its violation by the common carrier.

In the event this Honorable Court should decide that American citizens of color, travelling in Interstate Commerce as first class passengers, may be denied the first class accommodations and facilities furnished to all other white citizens, by the carriers who are engaged in the same continuous interstate journey, solely on account of race or color, then we urge that it is the duty imposed upon the common carrier to furnish to the citizen of color, first class facilities, accommodations and services, equal to those furnished the white American citizens who have paid the same first class fare as the colored citizen.

In *Hall* v. *De Cuir*, 94 U. S. 485, 24 L. Ed. 547 (1887), the doctrine, then announced has been followed by this

---

[49] *In Re Grice*, 79 F. 627, 645, the Court states:

"The subject of equality before the law is a fundamental principle of English and American liberty, it not only has been made sacred in all later day Constitutions, State and Federal, but the principle has been carried with jealous watchfulness, to see that the citizens may have guaranteed to them this inestimable privilege and condition. *Barbier* v. *Connolly*, 113 U. S. 27, 5 S. Ct. 357; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064; *Dent* v. *West Virginia*, 129 U. S. 114, 9 S. Ct. 231; *Ex Parte Virginia*, 100 U. S. 339; *Duncan* v. *Missouri*, 152 U. S. 382, 14 S. Ct. 570."

Honorable Court and all other Courts who have adhered to the Constitution and laws made for the protection of the rights of all American citizens. This doctrine may be stated as follows. All common carriers of passengers for hire are bound, if they have suitable accommodations, to take all persons who apply, unless there is objection to the character or conduct of the applicant. And when an applicant to whom there is no valid objection, applies for passage, he has a right to receive it. (*Hall* v. *De Cuir*, p. 501.) It is further held that a passenger has a right to require such accommodations as he has contracted for (p. 405).

It is not disputed that the appellant on April 20, 1937, contracted for first class accommodations from Chicago to Hot Springs, Arkansas (R. 70); that he received the class of accommodations for more than one-half of the interstate journey, and that upon leaving Memphis, Tennessee, he arriving at a point in the State of Arkansas, between Memphis and Hot Springs (R. 79), he was ejected from the first class accommodations by the conductor of the Rock Island, solely on account of his color (R. 79, 80, 81), and was compelled to ride in a car known as the "Jim Crow Car" (R. 81) which was used for citizens of color, who had only paid a less rate of fare and admitted to be second class accommodations, inferior to the first class accommodations which all other white citizens were permitted to use and occupy throughout the interstate journey. The conductor who received the first class ticket from the appellant, admitted that the appellant under the terms of his contract of carriage, was entitled to first class accommodations, but under the law of the State of Arkansas, the appellant could not continue to receive the first class accommodations to the end of his interstate journey (R. 81). A description of this "Jim Crow Car," in which appellant was compelled to ride is found (R. 82, 83, 84,

133, 134, 135, 165, 166, 167, 168). Description of the first class car from which the appellant was ejected, is found (R. 77, 78, 86, 90, 164, 165, 168), and repetition of the description will be avoided.

An abstract of the testimony of the Conductor Jones, is found (R. 36-38), and we believe the mere reading of this undisputed and uncontradicted testimony of Mr. Jones, who had charge of the Rock Island train for thirty-two years, will convince this Honorable Court that the Constitutional rights of the appellant had been violated in the manner described in his complaint and that the sole ground claimed for the unjust discrimination against this American Citizen, the appellant, by the common carrier, is that the appellant is a colored American citizen.[50]

Various cases involving the rights of American citizens of color to the equal protection of the laws have been decided by the Interstate Commerce Commission (R. 31).[51]

In the various cases heretofore decided by the Interstate Commerce Commission, it may be safely said that the fundamental principles of law enunciated by the Commission in each of the cases are as follows:

1. That colored people who buy first-class tickets to travel as interstate passengers must be furnished with

---

[50] For the convenience of the Court, we have printed the abstract of the evidence of all witnesses as contained in the initial brief of the appellant filed with the Interstate Commerce Commission (Appendix C, pp. 19-50), contained in a separate volume filed with this brief.

[51] *Councill* v. *Western and Atlantic R. R. Co.*, 1 I. C. C. 339, *Heard* v. *Georgia R. R. Co.*, 1 I. C. C. 428, *Edwards* v. *Nashville, Chattanooga and St. Louis Ry. Co.*, 12 I. C. C. 247. In each of these cases, the Commission entered a cease and desist order. The *Councill* and *Heard* cases are almost identical with the case at bar.

accommodations equally safe and comfortable with all other first-class interstate passengers.

2. Where a colored person pays a first-class fare on an interstate journey and he is compelled to occupy inferior and second-class accommodations of a Jim Crow car that he has been subjected to undue and unreasonable prejudice in violation of the Interstate Commerce Act and has been denied his constitutional rights of equal protection of the laws.

3. That it is the lawful duty which the common carrier engaged in interstate travel owes to the traveling public to furnish accommodations equal in comfort, accommodation and equipment without and discrimination where the same price is paid.

4. That the law, federal and state will not tolerate the doctrine any more in the transportation of persons than of property, viz: That one class is to be favored by the carrier over another when both have contracted and paid for the same kind of service, accommodations and facilities.

5. That all persons have the lawful right to purchase first- or second-class accommodations and if the carrier sells none but first-class accommodations he must give first-class services to the purchaser engaged in an interstate journey as such first-class passenger.

6. That there is no equality of rights, when the money of the white citizen purchases luxurious accommodations amid elegant company, and the same amount of money purchases for the black American citizen inferior quarters.

7. That all American citizens, black and white, now stand upon equal footing before the law and that any discrimination based upon color or race alone to which an

interstate passenger is subjected, not only violates the Constitution[52] and the laws enacted under it,[53] but is at war with our basic concepts of a democratic society and a representative government.[54]

The following cases fully support the contention of the appellant: *Heard* v. *Georgia Ry. Co.*, 1 I. C. C. 428, 429, 430, 431, 432, 433, 435, 436; *Heard* v. *Georgia R. R. Co.*, 3 I. C. C. 111, 116, 117, 118; *Councill* v. *Western & A. Ry. Co.*, 1 I. C. C. 339, 346, 347; *Edwards* v. *Nashville Chat. & St. L. Ry. Co.*, 12 I. C. C. 247, 250; *Brown* v. *Memphis & C. R. Co.*, 5 Fed. 499.

The following Federal cases also support the above propositions stated: *Gray* v. *Cincinnati Ry. Co.*, 11 F. 683, 686; *Murphy* v. *Western & A. R. R. Co.*, 23 F. 637, 639, 640; *Logwood and Wife* v. *Memphis & C. Ry.*, 23 F. 318, 319; *The Sue*, 23 F. 843, 844, 845, 846, 848.

It is respectfully contended that on the undisputed evidence appearing in the record that the District Court and the Interstate Commerce Commission have failed to follow the established principles of law.

---

[52] Article IV, Sec. 2, Cl. 1, United States Constitution, Appendix A, p. 12; Fourteenth Amendment, Sec. 1, Appendix A, p. 2.

[53] Title 8 U. S. C. Ch. 3, Sec. 41—Civil Rights, Appendix A, p. 1; Title 8 U. S. C., Ch. 3, Sec. 43—Civil Rights, Appendix A, p. 2; Title 49 U. S. C. Sec. 1 (5), Appendix A, p. 7; Sec. 2, Sec. 3 (1), Appendix A, p. 8.

[54] *Edgar Smith* v. *State of Texas*, Opp. Nov. 25, 1940, No. 33, Oct. Term 1940, United States Supreme Court, Opp. 2.

VI.

The Interstate Commerce Act contains a national comprehensive system for the regulation of Interstate Commerce which excludes the application of the local Separate Coach Law of the States.

Under the provision of the Constitution above set forth Congress was given exclusive jurisdiction of Interstate Commerce. Under its Constitutional power the "Interstate Commerce Act" was passed in 1887. Congress by the passage of this act has done no more than to regulate all interstate business of carriers and the primary purpose for which this Commission was established, was to enforce the regulations imposed by Congress. *Harriman* v. *Interstate Commerce Commission* (N. Y. 1908), 29 S. Ct. 115, 118, 211, U. S. 407, 418, 53 L. Ed. 253. The Chief purpose of the act to regulate commerce and its amendments was to prevent unjust preferences and undue discriminations and to secure uniformity of rates and service. *Denver & R. G. R. Co.* v. *Baer Bros. Mercantile Co.*, 187 F. 485, 109 C. C. A. 337 (Reversed on other grounds, 1914, 34 S. Ct. 641, 233 U. S. 479, 58 Law Edition 1055), *Interstate Commerce Commission* v. *Cincinnati, N. O. & Tex. Pac. Ry. Co.*, 167 U. S. 479, 17 S. Ct. 896, 42 L. Ed. 243, *Tex & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439, 27 S. Ct. 350, 51 L. Ed. 553.

In the language of Circuit Judge Sanborn in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 186 Fed. 966, 977:

> "if each of two citizens of unobjectionable mental, moral, and physical character, one a white man and the other a colored man, tenders and pays to one of the defendants Railway Companies that is operating its trains, chair cars, sleeping cars and dining cars the same, lawful rate for his transportation between the

same places in a chair car, or in a sleeping car, and for the customary use of a dining car on his journey, and the white man is furnished by the company with his ride in a chair car, or in a sleeping car, and with his dinner in the dining car, and the Railroad Company claiming authority under a state separate coach law, solely by reason of his color, prevents the colored citizen from riding in or using all of those cars and all other cars of a similar character, ejects him from any such car into which he enters, and refuses to carry him at all unless he ride in an ordinary coach, is the colored citizen accorded 'the equal protection of the laws' enjoyed by the white man and the unabridged privileges and immunities of citizenship as guaranteed by the Constitution of the United States and the laws made pursuant thereto and the uniformity of service as provided for in the Interstate Commerce Act?''

We submit that this question seems to bear its own answer and the facts contained therein are identical with the facts in the case at bar and unjust purpose and undue discrimination by such conduct, we submit, is clearly shown.

Since the original act to regulate commerce in 1887 Congress by repeated enactments has endeavored to control the whole field of Interstate Commerce and to regulate all relations between shippers, passengers, and carriers, so as to secure uniformity throughout the country and the Interstate Commerce Act must be construed to give the effect intended by Congress. *Hartness* v. *Iberia, etc., R. Co.* (D. C. La. 1924), 297 Fed. 622, 624, *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363.

Congress having exercised its control over the whole field of Interstate Commerce, we must look to the laws pertaining thereto for any right claimed by a common

carrier to discriminate against a passenger solely on account of his color. There is no law or regulation authorizing a common carrier to make such discrimination but on the contrary Congress well knew that the Constitution of the United States, and in particular the Fourteenth Amendment thereto, prohibited any discrimination against a citizen of the United States by a common carrier operating under the Interstate Commerce Act.

Mr. Justice Shiras, in *Tex. & Pac. Ry.* v. *Interstate Commerce Commission* (N. Y. 1896), 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, fully discusses the causes and reasons which lead to the enactment of the Interstate Commerce Act at page 209 states:

> "The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls rates or charges for or any difference in the treatment of home and foreign merchandise in respect to the same or similar service rendered in the transportation, when this transportation is done under the operation of this statute. Certainly it would require a proviso or exception plainly engrafted upon the face of the act to regulate commerce, before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates or charges made for, or any difference in its treatment for the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when handled and transported by Interstate carriers, engaged in carriage of the United States, *stand exactly upon the same basis of equality* as to tolls, rates, charges *and treatment for similar services rendered.*"

It is to be remembered that the case at bar involves the rights of a citizen of the United States traveling in Interstate Commerce to the equal protection of the law guaranteed by the Constitution of the United States and from unjust discrimination, prohibited by the Constitution and the laws of the United States. Congress having covered the entire field of Interstate traffic in passengers and property, did not see fit to provide for any discrimination of any citizen of the United States on account of color alone but on the contrary by Section 2 of the act specifically forbids and prohibits unjust discrimination by common carriers. No state or individual can make any laws, rules or regulations in conflict with those provided by the Interstate Commerce Act and Common Carriers engaged in the transportation of passengers and property under the act must conform to the judgment of Congress. *Lehigh Valley R. Co.* v. *Public Service Commission,* Second Dist. of the State of N. Y. (D. C. N. Y. 1921), 272 Fed. 758, Aff'd (1922) 42 S. Ct. 239, 257, U. S. 591, 66 L. Ed. 385.

Under the undisputed facts which show that the complainant was discriminated against solely on account of his race and color, while traveling as a first-class passenger, in Interstate Commerce, we submit that under the plain provision of the law, applicable alike to white and black citizens, unjust discrimination is clearly shown in the case at bar.

The problem of the regulation of interstate commerce is plainly national in area and dimensions. Moreover, laws of the separate states can not deal with it effectively and Congress having enacted the Interstate Commerce Act[55] all questions of the regulation of interstate commerce is

[55]Title 49 U. S. C. Secs. 1-156.

fully covered therein and can not be increased nor diminished by state action.[56]

It is urged that the principle contended for by the appellant is so well grounded in the decisions of this Honorable Court that lengthy discussion will not be necessary.

This Honorable Court in a very recent case, *Hines, et al.* v. *Davidowitz, et al.*, Opinion January 20, 1941, No. 22, Oct. Term 1940, sustains the contention of the appellant, that all separate car laws of the various states yielded to the Interstate Commerce Act which is a comprehensive intergraded scheme for the regulation of commerce, and at page 5 of the Opinion, Mr. Justice Black states:

"When the national government by treaty or statute has established rules and regulations touching the

---

[56]*Texas & Pac. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 211, 212, p. 211:

"The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, but reasonable to anticipate that the legislation would cover, or have regard to the entire field of interstate commerce, and that its scheme or regulation would not be restricted to a partial treatment of the subject."

See Case of the State Freight Tax, 13 Wall (82 U. S.) 232, which supports the national system doctrine. *Haskell* v. *Cowhan*, 187 Fed. 403, 408. *U. S.* v. *F. W. Darby Lumber Company, et al.*, 82 Oct. Term 1940, Opinion February 3, 1941, U. S. Supreme Court, which holds:

"The power to regulate commerce is the power 'to prescribe the rules by which commerce is governed.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect commerce, but embraces those which prohibit it. (Cases cited.) * * * The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution.' "

rights, privileges and obligations or burdens of aliens as such, the treaty is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article VI of the Constitution provides that 'this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.' "

The Commerce Clause of the Constitution[57] forbids discrimination whether forthright or ingenious and in every case it is the duty of this Honorable Court to determine whether a statute or practice, under attack, whatever its name may be, will in its practical operation work discrimination against citizens traveling as interstate passengers in interstate commerce.

---

[57] Article I, Sec. 8, Cl. 3, United States Constitution.

VII.

Congress has prohibited discrimination, undue prejudice, unreasonable and undue advantage and preference in relation to citizens traveling as interstate passengers.

The prohibitions contained in the Enforcement Acts[58] passed by Congress in 1866 and 1870, prohibiting the deprivation of any citizen of the United States of any rights, privileges or immunities secured by the Constitution and laws of the United States is evidence of the policy of the United States towards all citizens.

The plain language of the above quoted section clearly demonstrates that Congress intended that no discrimination, unreasonable and undue advantage should be taken or shown against any citizen, solely on account of the race, color or creed of the citizen. It is to be noted that the last mentioned section applies to *every person*. It also prohibits as a defense, a claim by the offender, as an excuse

---

[58]Title 8, U. S. C., Cha. 3, Sec. 41 and 43—Civil Rights.

Section 41. Equal rights under the law. *All persons* within the jurisdiction of the United States shall have the same right *in every State* and Territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, and penalties, taxes, licenses, and exactions of every kind, and to no other. (R. S. par. 1977).

Section 43. Civil action for deprivation of rights. Every *person* who, under color of any statute, * * * *regulation, custom*, or *usage*, of any State or Territory, subjects, or causes to be subjected, *any citizen* of the United States or *other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit *in equity*, or *other proper proceeding for redress*. (R. S. par. 1979).

for discrimination, any *regulation, custom or usage,* etc. It not only provides that the injured party may proceed by an action *at law or suit in equity,* but it provides that the injured party may seek redress *"by other proper proceedings."*

Congress did not content itself with the provisions of the Enforcement Acts in order to prohibit discrimination, undue prejudice, unreasonable and undue advantage and preference against any citizen or person within the jurisdiction of the United States but to further protect every citizen in the enjoyment and exercise of their civil rights enacted the Interstate Commerce Act of 1887.[59] The Commerce Act again prohibited all persons operating in Interstate Commerce, as common carriers, from the practice of discrimination against, not only persons traveling as interstate passengers but against shippers of goods in interstate commerce. It further prohibited unjust discrimination, undue and unreasonable prejudices, undue advantage and preference and further prohibited interstate carriers from charging different rates for the same services rendered.[60]

[59]Title 49, U. S. C. Secs. 1-156.

[60]Title 49, U. S. C. Secs. 1 (1) (2) (5), 2, 3 (1), 13 (1) (4).

VIII.

The appellant having suffered direct injury to his rights guaranteed by the Constitution of the United States and laws made pursuant thereof has the absolute right to prosecute these proceedings.

Some question has been raised as to the right of the plaintiff to apply for a cease and desist order upon the facts alleged in his complaint filed with the Interstate Commerce Commission.

It is submitted that the ruling of the Commission on this point sustains the appellant's right to prosecute these proceedings (R. 19-20). No exceptions were filed to the report of the Commission by any of the defendants who were parties thereto.

This Honorable Court has sustained the right of the plaintiff in numerous cases.[61]

---

[61] *Truax* v. *Raich*, 239 U. S. 33, 38, which holds that where the plaintiff's rights are directly involved he is a proper party to seek redress, and that where a party seeks to enforce a contract on the ground that as a citizen of the United States, he has the same rights as all white citizens (Enforcement Act, Title 8, Sec. 41-43, Fourteenth Amendment of the United States Constitution, Art. 4, Sec. 2, Cl. 1, United States Constitution); *Buchanan* v. *Warley*, 245 U. S. 60, 73, "This case does not come within the class wherein this Court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved." (See *Truax* v. *Raich*, 239 U. S. 33, 38).

The appellant, an American citizen, had contracted and paid for first-class accommodations and facilities for an interstate journey from Chicago to Hot Springs. He was denied equality of treatment as an interstate first-class passenger in that other first-class passengers who had paid a similar fare for first-class accommodations were furnished such first-class accommodations throughout the entire journey. The appellant was compelled by the Rock Island to ride in a jim crow car containing only second-class accommodations, for part of his journey. This inequality of treatment gave to the appellant the undoubted right to apply for redress to the Interstate Commerce Commission.[62] It is unnecessary to labor the point.

IX.

What is unjust discrimination prohibited by the Interstate Commerce Act?

The uncontradicted and indisputable evidence in the case at bar clearly shows that the appellant is a native-born American citizen, that he had purchased a first-class round trip ticket from Chicago to Hot Springs (R. 70-71); that he paid the regular first-class fare for the ticket (R. 70); had been received by the defendants as a first-class interstate passenger (R. 70); his ticket had been collected by the conductor on the Rock Island (R. 79), while he was occupying first-class accommodations the same as all other

---

[62]Title 49, Sec. 13. The Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 320, in which case this Court states:

> "It is injury inflicted by denying to the plaintiff equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper." *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 35 S. Ct. 370, 59 L. Ed. 616.

first-class passengers engaged in this interstate journey and who had paid a similar fare for the first-class service.

That solely on account of his color he was ejected from the first-class accommodations before he had completed his journey (Abst. 79), and compelled to ride in a car containing only second-class accommodations for which the charges were less than the first-class fares. The description of the jim crow car in comparison with the first-class accommodations of the Pullman and observation cars have heretofore been referred to.

To charge one person more than another for the same accommodations is unjust discrimination, *United States* v. *Chicago Heights Trucking Company,* 310 U. S. 344, 351, 353; 60 S. Ct. 931, 84 L. Ed. 1243, and violates Sec. 2 of the Interstate Commerce Act.

To charge one interstate passenger a greater or less compensation for any service rendered or to be rendered in the transportation of property or passengers than is charged any other person for doing a like and contemporaneous service in the interstate transportation of a like kind under substantially similar circumstances and conditions violates Secs. 2 and 3 of the Interstate Commerce Act. (Appendix A, p. 8 and Sec. 1, par. 5 of the Interstate Commerce Act, Appendix A, p. 7.) It was the duty of the Commission, upon the undisputed facts as shown by the evidence of all witnesses (Appendix C, pp. 19-50) to have entered a cease and desist order (Sec. 15 (1), Interstate Commerce Act, Appendix A, p. 10), and failing to do its duty the District Court should have set aside the order of dismissal (Title 28, U.S.C. 41 (28), Appendix A, p. 2).

The uncontradicted and undisputed evidence clearly shows that the allegations in the complaint had been fully sustained.

X.

Custom does not justify continued unjust discrimination.

Custom cannot override the law and a failure to enforce the law does not change it. The good faith of the carrier in the transactions of the past may be unquestioned, but that does not justify a continuance of a practice which violates the Interstate Commerce Act. *American Express Company* v. *United States,* 212 U. S. 522, 523, 529; 29 S. Ct. 315; *Merchants Warehouse Company Case,* 283 U. S. 501, 511, 512.

We do not believe it necessary to do other than to state that if this Honorable Court shall find that the discrimination practiced by the Rock Island against an interstate passenger, solely on account of his race or color, has existed for the past 32 years as stated by the conductor Jones in his testimony before the Commission (R. 36-38), (Appendix C, pp. 41, 44, 45, 46, 48), then we respectfully urge that the above proposition of law be followed.

XI

Erroneous holding of the Commission concerning the right of the appellant to purchase and use first-class accommodations in Interstate Commerce.

The Commission states (R. 28):

> "Complainant urges that collection of the first-class fare, notwithstanding the fact that second-class accommodations were furnished him, was violative of sections 1, 2, 3, and 6 of the act; also of the Fourteenth Amendment, on the ground that he was deprived of money without due process of law and denied equal protection of the laws. It is sufficient to say that a

first-class ticket was furnished and charged for because complainant wanted it, and that after it developed that the first-class accommodations ordinarily available for colored passengers west of Memphis were all taken by other passengers defendants offered to refund the difference. Moreover, as already stated, complainant is here seeking no relief from the charges paid."

It is conceded that the complainant is a native born American citizen; that he had contracted and paid for first-class accommodations; that he was traveling on a common carrier engaged in interstate commerce, and that he was an interstate passenger. It is further conceded, that he received the same first-class services which were given to all other first-class passengers, for only a part of the journey; that he was denied first-class services for the remainder of his journey, solely on account of his color (R. 36-39), although such services were furnished to all other interstate passengers on this journey who were white persons. The Constitution of the United States, the laws made in conformity therewith and the provisions of the Interstate Commerce Act, prohibit discrimination against citizens of the United States, solely on account of their race or color. We can not conceive that the Commission would limit the right of a white citizen in selecting to travel as a first-class passenger on an interstate journey, and that if the complainant was a white person, member of the Congress of the United States, and had received the identical treatment received by the complainant in the case at bar, solely on account of color, we do not believe that the Commission would find that no unjust discrimination existed, and that a common carrier was justified by such conduct.

The conductor frankly stated that he would not permit a colored man to occupy the first-class accommodations on

his train (R. 38, 172), and that for 32 years the Rock Island had failed to provide first-class accommodations for citizens of the United States, solely on account of their color (R. 36, 159). We believe no white American citizen with red blood in his veins with a knowledge of the provisions of the Constitution, and the laws of Congress, with respect for the decisions of the Supreme Court of the United States, would condone the unchristian and un-American conduct, as shown by the record in this case, as having been perpetrated against the complainant.

We believe it is well and fitting to quote from the language of Circuit Judge Sanborn, in his dissenting opinion in *McCabe* v. *Atchison, Topeka & Sana Fe Ry.* (186 F. 966, 983):

> "The true interpretation of the Fourteenth Amendment is to be found in the decisions of the Supreme Court when it was composed of those great jurists who had been active in public affairs when it was proposed and enacted and who could not fail to know its purpose and its meaning. In *Strauder* v. *West Virginia,* 100 U. S 303, 306, 25 L. Ed. 664, that court said:
>
> 'This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoyed. * * * They especially needed protection against unfriendly action in the states where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It

not only gave citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws and authorized Congress to enforce its provisions by appropriate legislation. * * * It ordains that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that a law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and, in regard to the colored race for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored—exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy and discriminations which are steps towards reducing them to the condition of a subject race.' "

We submit that this interpretation of the Fourteenth Amendment, above referred to, needs no argument to show that the civil rights of both white and black American citizens are equal, and that any treatment of a black citizen which denies to him such equal rights, is discriminatory, and prohibited by law.

XII

Refund of Money Is Not Adequate Redress for the Wrongful Exclusion by a Common Carrier of an American Citizen Engaged in An Interstate Journey As a First-Class Passenger.

In the case at bar the undisputed and uncontradicted testimony of all witnesses shows that the appellant was engaged on a continuous interstate journey from Chicago to Hot Springs as a first-class passenger and that he was ejected from the first-class accommodations and facilities which he occupied during a portion of his interstate journey (R. 36, 37, 38).[63] The appellant by these proceedings, is seeking a cease and desist order for the purpose of prohibiting a continuance of the pernicious practice of discrimination in interstate commerce against an American citizen, solely on account of his race or color.

In *Brown* v. *Memphis & C. Ry. Co.*, 7 Fed. 51, 63 (C. C. Tenn.), the Circuit Court in a passing upon the proposition of law above stated holds that mere refund of money is not adequate redress.[64] In the same case the Court held

---

[63] The condensed testimony of Albert W. Jones, conductor on the Rock Island for 32 years and a witness for the defendants.

[64] *Brown* v. *Memphis & C. Ry. Co.*, 7 Fed. 51, 63:

> "The mere price of a ticket, or refunding of the money, will not answer the purpose in all cases; that would be simply to permit the carrier to enforce the unreasonable regulations, because he should never claim to keep the money *while refusing to render the service. He would take no money or refund all received, and go on with his business in his own way,* and the plaintiff or the public would be no better off. In *Pearson* v. *Daune,* 4 Wall 605, a captain put off a passenger from a humane motive to save his life—the exclusion was held *wrongful* although the passenger had no money of his own and had paid for no ticket."

(p. 64) that the wrongful exclusion is an act against the public.

The mere refund offered to the plaintiff is not adequate redress and we believe that this Honorable Court will take judicial notice of the unjust discrimination practices by various common carriers against American citizens traveling as first-class passengers in interstate commerce, because such practice is a matter of common knowledge.

XIII

Judicial Notice.

In *United States ex rel Weinberg* v. *Scholtfeldt, etc.*, 26 F. Supp. 283, 284, states:

> "It is a matter of common knowledge that at the present time in Central Europe the jews are being persecuted and property confiscated and that they are obliged to seek sanctuary in other countries."

If the Federal Courts can take judicial notice of the persecution of human beings in Central Europe we believe it to be a fair request that this Honorable Court take judicial notice that American citizens of color traveling in interstate commerce as first-class passengers are unjustly discriminated against by certain common carriers in certain sections of the United States, solely on account of their race and color. In view of the legal status of all American citizens of color under the Constitution and the laws made in pursuance thereof,[65] and the decisions of this

---

[65] United States Constitution, Fourteenth Amendment, Art. 4, Sec. 2, Cl. 1, United States Constitution, Title 8, U. S. C. Ch. 3, Sec. 41-43.

Honorable Court,[66] and other Federal Courts we believe that the time has now arrived for this Honorable Court to hold, that all American citizens, black and white, traveling in interstate commerce cannot be affected in the kind of service, accommodations and facilities they are to receive by the Separate-Coach Laws of the several States.

In *Ohio Bell Telephone Co.* v. *Public Utilities Co. of Ohio,* 301 U. S. 292, 301, this Court states:

> "Courts take judicial notice of matters of common knowledge." 5 Wigmore Evidence, Pars. 2571, 2580, 2583; Thayer Preliminary Treatise on Evidence, pp. 277, 301. "They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants (citing cases)."

XIV

Questions Not Involved in This Appeal.

In order that the issues involved in the case at bar may not be confused we wish to state:

1. That the constitutionality of the separate-coach law of Arkansas has not been attacked in this proceeding but only its unconstitutional application by the Commission on the claim of the defendant Rock Island, as shown by the uncontradicted and undisputed testimony of its witness Jones, that he was not acting under any rules or regulations promulgated by the Rock Island but, as the conductor of the train and in charge of its operation on behalf of the Rock Island, he was acting under cover of the Arkansas Separate-Coach Law (R. 178).

---

[66] *Strauder* v. *West Virginia,* 100 U. S. 303, 306, 25 L. Ed. 664; *McCabe* v. *Atchison T. & S. F. Ry. Co.,* 235 U. S. 151, 162, 186 Fed. 966, (see dissenting opinion Circuit Judge Sanborn, 977-989).

We do not concede that the Separate-Coach Law is constitutional but for the purpose of this appeal we are not drawing into question its validity.

2. We are not asking this Court to consider the weight of conflicting evidence nor the wisdom of the order entered by the Commission. Such request, we know, would be unavailing under the decisions of this Court,[67] nor to substitute its judgment on conflicting evidence for that of the Interstate Commerce Commission on matters purely administrative,[68] nor to consider the credibility of witnesses.[69]

In the case at bar the undisputed and uncontradicted testimony of all of the witnesses, on the main issues involved conclusively shows that there is no conflict of evidence therefore the main question presented by this appeal involves the application of the law to the facts.

---

[67] New England Divisions Case, 261 U. S. 184, 204; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457; *Skinner & Eddie Corp.* v. *United States,* 249 U. S. 557, 562; *Seaboard Airline Ry. Co.* v. *United States,* 254 U. S. 57, 62.

[68] *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361.

[69] *Merchants Warehouse Co.* v. *United States, et al.,* 283 U. S. 501, 508.

XV.

The order of the Interstate Commerce Commission and the decree of the District Court should be reviewed by this court and set aside.

The constitutional rights of the appellant were claimed to have been violated on his interstate journey (R. 3-7), and this Court in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 459, holds that in matters involving constitutional rights the orders of the commission are not conclusive.

A.

The order of the Interstate Commerce Commission is void because it rests upon an erroneous application of the rules of law:

1. That the Separate Coach Law of Arkansas applied to Interstate Commerce.
2. That the volume of traffic was to be taken into consideration in deciding whether or not a citizen had been discriminated against solely on account of his color and denied first-class accommodations on an interstate journey for which he had paid.
3. In holding that the constitutional rights of the appellant were not involved.
4. In failing to follow the decision of this Honorable Court in *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151.
5. In holding that the carrier was justified in assuming to follow the Separate Coach Law of Arkansas instead of the Constitution of the United States and laws made in pursuance thereto, which have

been declared to be the Supreme Law of the Land. (Art. VI, Cl. 2, United States Constitution, (Appendix A. p. 12).)

The above holdings are supported by *Interstate Commerce Commission* v. *Diffenbaugh,* 242 U. S. 42; *Rochester Telephone Company* v. *United States, et al.,* 307 U. S. 125, 130, 135.

B.

The order of the commission is based upon a finding made without any evidence to support it and the District Court should have set the same aside, *Interstate Commerce Commission* v. *Union Pacific R. R. Company,* 222 U. S. 541, 547; *Chicago Junction Case,* 264 U. S. 258, 263; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Company,* 227 U. S. 88, 91; *Florida East Coast Ry. Company* v. *United States,* 234 U. S. 167; *Baltimore & Ohio R. R. Company* v. *United States,* 277 U. S. 291, 300, 301, and numerous cases heretofore decided by this Honorable Court.

The evidence of conductor Jones, a witness for the defendants and whose testimony concerning the material issues is undisputed and uncontradicted, (R. 36-38), we believe to be sufficient, standing alone, to clearly demonstrate this contention of the appellant. The testimony of the appellant and all other witnesses do not differ as to the unjust discrimination. The decree of the District Court should be reversed.

XVI.

Cases which have been cited by some of the defendants in prior stages of this proceeding which we claim are not in point.

In view of the fact that a brief period of time is allowed for a reply brief by the appellant, we take the liberty of now calling to the attention of this Honorable Court a number of cases, which have been heretofore cited by some of the defendants as sustaining the right to discriminate against citizens of the United States, solely on account of their race and color.

Plessy v. *Ferguson,* 163 U. S. 537, 538, 540, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), has been cited to sustain the application of a separate coach law in interstate commerce. A mere reading of the case will demonstrate its inapplicability. At page 538, it is stated:

> "That on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from *New Orleans to Covington in the same State,* etc."

This clearly shows that any question raised or decided must necessarily relate to intrastate transportation and not interstate. The well rendered dissenting opinion of Mr. Justice Harlan clearly sustains the present views of all liberty loving American citizens, and we urge that this masterpiece be given consideration in support of the contention of the appellant that

> "Any discrimination against an American citizen, travelling as a passenger in interstate commerce in the United States solely on account of his race or color is unjust, unreasonable and unAmerican, and not only

violates our Constitution and the laws enacted under it, but is at war with our basic conception of a democratic society and a representative government.''[70]

It is respectfully submitted that if the judgment of the District Court and the report of the Interstate Commerce Commission is permitted to stand as a part of the law of this nation, it will carry out the prophecy of Mr. Justice Harlan in his dissenting opinion rendered in *Plessy* v. *Ferguson,* 163 U. S. 537, p. 559, which is as follows:[71]

559 ''In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. It was adjudged in that case that the descendants of Africans, who were imported into this country and sold as slaves were not included nor intended to be included under the word 'citizens' in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were 'considered as a subordinate and inferior class of beings, who had
560 been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.' 19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But

---

[70] *Smith* v. *Texas,* No. 33, October Term, 1940, U. S. Supreme Court, Opinion, November 25, 1940; *Plessy* v. *Ferguson,* 163 U. S. 537, at p. 559.

[71] This portion of the dissenting opinion of Mr. Justice Harlan in *Plessy* v. *Ferguson,* 163 U. S. 537-559 is specifically referred to.

it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight million of blacks. The destinies of the two races, in this country, are both indissolubly linked together, and the interest of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

"The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United

States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis
561 of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when travelling in a passenger coach or a public highway than when members of the same race sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting."

The case of *Plessy* v. *Ferguson*, 163 U. S. 537, was distinguished in *Buchanan* v. *Warley*, 245 U. S. 60, (p.) 79. The facts in this case clearly show that appellant was not furnished first class accommodations and facilities equal to those furnished other first class interstate passengers, travelling on the same interstate journey and train with the appellant and who had paid a similar rate of fare for transportation.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 540, it will be noted that no question of the application of the separate coach law of Louisiana to *interstate* transportation was involved nor decided, and the case decided, only, a local question

of *intrastate commerce.* Cases are cited in the opinion concerning the separation of American citizens solely by reason of their race or color, but the cases cited were only applicable at that time to local laws concerning local situations or matters which the Supreme Court of the State had held applicable only within the State without any reference to interstate commerce.

In *Berea College* v. *Commonwealth of Kentucky,* 211 U. S., 45, 53, 54, 29 S. Ct., 33, 53 L. Ed. 81 (1908) is not applicable to the case at bar. This case is also distinguished in *Buchanan* v. *Warley,* 245 U. S. 60, 79. The *Berea College* case, *supra,* involved an indictment against a local corporation for violation of a State law requiring the separation of students on account of color and race, alone. The Court in deciding that the matter involved a local situation concerning the relation of a domestic corporation to the State by which it was created, held (p. 53-54):

> "The State which grants to a corporation a charter and reserves the right to amend, alter and regulate the corporation could do so because the corporation only exists by virtue of the conditions stated in its charter. * * *
>
> Power exercised by the State over the corporation could not be exercised over an individual without violating the constitutional rights of the individual."

In the case at bar, the constitutional rights of a citizen is in issue. This case does not apply to the case at bar.

In the case of *Chiles* v. *Chesapeake & Ohio Railway,* 218 U. S. 71, 72, 74, (1910), 54 L. Ed. 936, 30 S. Ct. 667, the mere reading of the opinion will clearly show that the Court of Appeals, which is the highest court in Kentucky, having held that the Segregation or Separate Car laws

of the State of Kentucky only applied to *intrastate* commerce, and not to interstate commerce, no question was raised nor decided in this case, concerning the application of the Separate Car Act as applying to interstate commerce, and the court states (p. 72):

> "The Court of Appeals of the State made the case turn on a narrow ground, to wit: *'The right which it was decided, a railroad company had to establish such rules and regulations as will require white and colored passengers, although they may be interstate to occupy separate compartments upon the train.'* The Court however, said that there could be no discrimination in accommodations."

The Court at page 74 also states:

> "There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, *but the Court of Appeals of the State put the statute out of consideration, declaring that it had no application to* INTERSTATE TRAINS, and defendant in error does not rest its defense upon that Statute, but upon its rules and regulations."

In the case at bar there is no defense by the defendants of rules and regulations and they rest upon the Statute of Arkansas which does not apply to *interstate commerce.*[72]

---

[72] In the re-direct examination of the witness Jones who was the conductor in charge of the Rock Island Train at the time of the occurrence, April 20, 1937, by Mr. Taylor, attorney for the Rock Island, stated he was not enforcing any rules of the company but was acting under color of the separate car law of Arkansas, and the following appears of record (R. 178):

> "Q. I want to ask you again, because I may have misunderstood your answers: Have you ever been

Smith v. *Tennessee*, 46 S. W. 566, 100 Tenn. 494, 41 L.R.A. 432 (1898), was decided about 40 years ago and is only the opinion of a state court during that period of the development of the United States. No colored passenger was claiming that his constitutional rights had been violated nor that a person of color had been unjustly discriminated against solely by reason of his race or color. This case was dismissed in this court on motion (Oct. Term 1900, 21 S. Ct. 917, 45 L. Ed. 1256) and was not reviewed by this court.

The *Smith* case, *supra*, has only been cited and followed by the Supreme Court of Mississippi in *Southern Railway Company* v. *Norton*, 73 So. 1, 112 Miss. 302 (Dec. 4, 1916), and *Southern Railway Company* v. *Primrose*, 73 So. 2, companion cases.

The case of *Alabama Railway Company* v. *Morris*, 103 Miss. 511, 60 So. 11, Ann. Cas. 1915B, 613, is only the decision of a state court which has not been approved nor followed in modern times. The Tennessee Court in refer-

---

given any instructions or directions or any rules with reference to how you shall treat colored passengers in Pullman coaches, by the railway company?

"A. No, sir.

"Q. I understood you, and maybe I misunderstood you, somewhere in your examination to answer counsel that something was according to the rules of the company. Were you referring there, or did you intend to refer there (fol. 329) to your practice of undertaking to enforce the Arkansas Separate Coach Law?

"A. Oh, I get what you mean now. No. I meant, *I was enforcing the law, not the rules of the company.* It is not the rules of the company. It is the law, that I am enforcing, and not the rules of the company, because I have never had any instructions from any one on the railroad as to just how to handle these cases, so that it was left up to me.

"Mr. Taylor: That is all."

ring to the applicability of the State Separate Coach Law to interstate commerce (46 S. W. p. 571) said:

> "That question is an open one under the decisions of the Supreme Court of the United States."

This was an indictment against an agent of a railway company operating within the State of Tennessee. The learned Justice delivering the opinion in *Smith* v. *Tennessee*, 41 S. W. 566, must have overlooked *Brown* v. *Memphis and C. Ry. Company*, 5 Fed. 499 (C. C. Tenn. 1880), in which the Federal Court in Tennessee stated the law concerning the applicability of the Separate Coach Law of Tennessee as follows (p. 501):

> "That this act of the legislature, so far as it abrogated the common law right of case for wrongful exclusion from railroad cars or roads running between two or more states is *unconstitutional*, because it was a regulation of commerce between the states, which is it, the legislature, *had no right to make, the exclusive right to make it being by the Constitution of the United States, in Congress. Hall* v. *DeCuir*, 95 U. S. 485."

In *Southern Railway Company* v. *Norton*, 73 So. 1, 112 Miss. 302, was not reviewed by this Honorable Court. No question was involved concerning the violation of the constitutional rights of an American citizen of color, and the railroad company operating within the State of Mississippi, apparently, was satisfied with the decision.

The Supreme Court of Maryland in *Hart* v. *State*, 60 Atl. 457, 463, 100 Md. 595 (1905), refused to follow *Smith* v. *Tennessee*, 46 S. W. 566, and stated that the Supreme Court of the United States on analogous questions had held to the contrary.

In *South Covington & Cincinnati S. T. Ry. Co.* v. *Kentucky*, 252 U. S. 399, 40 S. Ct. 378 (Decided April 19, 1920),

in which case Mr. Justice McKenna delivered the opinion of the Court, a mere reading of the opinion will disclose that the case is not applicable to the issues involved in the case at bar.

The facts show that the defendant Street Ry. Co., had gained control of the entire stock of a corporation chartered by the State of Kentucky; that the Kentucky Corporation had been granted certain rights by the State of Kentucky; that each termini and all stations of the Cincinnati, Covington and Erlanger Ry. Co., were within the State of Kentucky; that the crime charged in the indictment was for the unlawful operation of the railway within the State of Kentucky; that there was a distinct operation within the State of Kentucky under the State charter granted by the State of Kentucky, and *that the operation alone was regulated and not interstate character, except incidentally;* that the interurban railway company derived all of its power from the charter granted by the State of Kentucky and the Court states (40 S. Ct. 379):

> "* * * An interurban railroad company deriving its powers from the State, and subject to obligations under the laws of the state, *should not be permitted to exercise the powers given by the state and escape its obligations to the state under the circumstances presented by this record, by running its coaches beyond the state lines.*"

The Court further states (40 S. Ct. 379):

> "There was a distinct operation in Kentucky, an operation authorized and required by the charters of the companies and it is that operation, the act in question regulates, and does no more, and therefore is not a regulation or interstate commerce. This is the effect

of the ruling in *South Covington Ry. Co.* v. *Covington*, 235 U. S. 537, 35 S. Ct. 158, 59 L. Ed. 350, L. R. A. 1915, F. 792."

Mr. Justice Day dissenting (40 S. Ct. 380), states:

"It is admitted that this regulation would not apply to interstate passengers, and colored passengers going from Cincinnati to Kentucky on a through trip would not be subjected to the regulations."

In this case there was no claim by a citizen that his rights under the Fourteenth Amendment of the United States Constitution and the enforcement act had been violated.

In *Cozart* v. *Southern Ry. Company*, 16 I. C. C. 226, 230, (1909), the complaint was dismissed because the evidence failed to support the charge contained in the complaint but the commission reaffirmed the doctrine stated in *Edwards* v. *Nashville Chattanooga and St. Louis Railway, et al.*, 12 I. C. C. Rep. 247.[73]

In *Gaines* v. *Seaboard Air Line Ry. et al.*, 16 I. C. C. 471, (1909), a mere reading of the report of the commission will clearly demonstrate that the case has no application to the case at bar.

---

[73] The language of the Commission p. 230, is as follows:
"In *Edwards* v. *N. C. and St. L. Ry. et al.*, 12 I. C. C. Rep. 247, the principle was enunciated that common carriers may not, in the accommodations which they furnish to each, unjustly discriminate between white and colored passengers paying the same fare. On that authority of that decision and the cases there cited, the principle is here reaffirmed."

CONCLUSION.

Simple justice in the interpretation and application of the Federal Constitution, the Fourteenth Amendment and all laws made pursuant thereto, should require equality in interstate transportation of all American citizens without regard to race or color, as any other interpretation will nullify their plain and unambiguous provisions.

Respectfully submitted,

RICHARD E. WESTBROOKS,
ARTHUR W. MITCHELL, *pro se*,
Attorneys for Appellant.

BLANK PAGE

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Appendices to Brief for Appellant.

RICHARD E. WESTBROOKS,
Chicago, Illinois

and

ARTHUR W. MITCHELL, *Pro Se,*
Chicago, Illinois
Attorneys for Appellant.

PRINTED BY CHICAGO LAW PRINTING CO.

FILED NOVEMBER 18, 1940

PROBABLE JURISDICTION NOTED DECEMBER 16, 1940.

INDEX TO APPENDICES.

PAGES

APPENDIX A—

Statutes involved 1-11

Constitutional provisions involved 12-13

APPENDIX B—

Separate coach law of Arkansas 15-18

APPENDIX C—

Abstract of evidence before the Commission..... 19-50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Appendices to Brief for Appellant.

APPENDIX A.

STATUTORY PROVISIONS INVOLVED.

TITLE 8, U.S.C., Chapter 3, Section 41—CIVIL RIGHTS.

Section 41. Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for

the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other (R.S. par. 1977).

TITLE 8, U.S.C., Chapter 3, Section 43—CIVIL RIGHTS.

Section 43. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress (R.S. par. 1979).

TITLE 28, Section 41, Sub. Div. 14, U.S.C.

Suits to Redress Deprivation of Civil Rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States or of any right secured by any law of the United States, providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States (R.S. Sec. 563, par. 12, Sec. 629, par. 16; Mar. 3, 1911, c. 231, sec. 24, par. 14, 36 Stat. 1092).

TITLE 28, U.S.C., Section 41, Sub. Div. 28.

Sec. 41, Subd. (28) *Setting Aside Order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Sec. 1, 36, Stat. 539; Mar. 3, 1911, c. 231, Sec. 208, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38, Stat. 219.)

TITLE 28, U.S.C., Sec. 43.

Section 43. *Venue of Suits Relating to Orders of Interstate Commerce Commission.* The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the district where one of the petitioners in court has either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, c. 32, 38, Stat. 219.)

TITLE 28, U.S.C., Section 45.

(*Judicial Code,* Section 209). *District Courts; Practice and Procedure in Certain Cases.* The jurisdiction of the district courts of cases brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every de-

fendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. In all other respects the practice and procedure shall conform as nearly as may be to that in like cases in a district court of the United States. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 209, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

TITLE 28, U.S.C., Section 47.

Interlocutory Injunctions as to Orders of Interstate Commerce Commission; Appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be a circuit or district

judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect

to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

TITLE 28, U.S.C., Section 47-a.

Sec. 47a (*Judicial Code*, Section 210) Appeal to Supreme Court from final decree; time for taking; priority. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)

TITLE 28, U.S.C., Section 48.

Judicial Code, Section 211. Suits to be against United States; intervention by United States. All cases and proceedings brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceedings whenever, though it has not been a party, public interests are involved. (June 18, 1910, c. 309, Sec. 4, 36 Stat. 542; Mar. 3, 1911, c. 231, Sec. 211, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 219.)

TITLE 49, U.S.C., Section 1, Par. 1.

Carriers Subject to Regulation. The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment.

TITLE 49, U.S.C., Section 1, Par. 2.

(a) *Transportation Subject to Regulation.* The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, * * *

TITLE 49, U.S.C., Section 1, Par. 5.

Just and Reasonable Charges Required: Classification of Messages, and Rates; Exchange of Services. All charges made for any service rendered or to be rendered in the transportation of passengers * * *, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof

is prohibited and declared to be unlawful; * * * *And Provided Further* * * *.

TITLE 49, U.S.C., Section 2.

Special Rates and Rebates Prohibited. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers * * * subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation * * * under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, c. 104, Sec. 2, 24 Stat. 379; Feb. 28, 1920, c. 91, Sec. 404, 41 Stat. 479.)

TITLE 49, U.S.C., Section 3, Par. 1.

Preferences: Interchange of Traffic; Terminal Facilities.

(1) *Undue Preference or Prejudices Prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * in any respect whatsoever or to subject any particular person, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (As amended Aug. 12, 1935, c. 509, 49, Stat. 607.)

TITLE 49, U.S.C., Section 4.

Duty to Furnish Transportation and Establish Through Routes Division of Joint Rates. It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers * * * to provide and furnish such transportation upon reasonable request there-

for, and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes * * *; and in case of joint rates, fares or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

TITLE 49, U.S.C., Section 13, Par. 1.

Section 13. *Complaints to and Investigations by Commission.*—(1) *Complaint to Commission of Violation of Law by Carrier.* Reparation: Investigation. Any person, * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

TITLE 49, U.S.C., Section 13, Par. 4.

(4) *Duty of Commission Where State Regulations Result in Discrimination.* Whenever in any such investiga-

tion the commission, after full hearing, finds that any such rate, fare, charge, * * * regulation or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons * * * in interstate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge * * * thereafter to be charged, and the * * * regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, * * * regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State Authority to the contrary notwithstanding. (Feb. 4, 1887, c. 104, Sec. 13, 24, Stat. 383; June 18, 1910, c. 309, Sec. 11, 36 Stat. 550; and Feb. 28, 1920, c. 91, Sec. 416, 41 Stat. 484.)

TITLE 49, U.S.C., Section 15, Par. 1.

Determination of Rates, Routes, Etc.; Routing of Traffic; Disclosures, Etc.—(1) *Commission Empowered to Determine and Prescribe Rates, Classifications, Etc.* Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such

carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

TITLE 49, U.S.C., Section 15, Par. 2.

(2) *Orders of Commission.* Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED.

ARTICLE I, Section 8, Clause 3, UNITED STATES CONSTITUTION.

Section 8. The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and *among the several States*, and with the Indian Tribes."

ARTICLE I, Section 10, Clause 1, UNITED STATES CONSTITUTION.

Section 10. No State shall * * *

Pass any law impairing the obligation of Contracts * * *."

ARTICLE IV, Section 2, Clause 1, UNITED STATES CONSTITUTION.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

ARTICLE VI Clause 2, UNITED STATES CONSTITUTION.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

FOURTEENTH AMENDMENT TO CONSTITUTION OF UNITED STATES, Sections 1 and 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

BLANK PAGE

APPENDIX B.

SEPARATE COACH LAW OF THE STATE OF ARKANSAS.

(Pope's Digest, Chap. XX, Sections 1190 to 1201.)

EQUALITY OF ACCOMMODATIONS.

1190 All railway companies carrying passengers in this state shall provide equal but separate and sufficient accommodations for the white and African races by providing two or more passenger coaches for each passenger train; provided, each railway company carrying passengers in this state may carry one partitioned car, one end of which may be used by white passengers and the other end by passengers of the African race, said partition to be made of wood, and they shall also provide separate waiting rooms of equal and sufficient accommodations for the two races at all their passenger depots in this state.

Exception as to street cars.

1191 The foregoing section shall not apply to street railroads. In the event of the disabling of a passenger coach, or coaches, by accident or otherwise, said company shall be relieved from the operation of this act until its train reaches a point at which it has additional coaches.

Passengers to occupy places assigned.

1192 No person or persons shall be permitted to occupy seats in coaches or waiting rooms other than the ones assigned to them on account of the race to which they belong; provided, officers in charge of prisoners of different races may be assigned with their prisoners to coaches where they will least interfere with the comfort of other passengers; provided, further, that Section 1190 shall not apply to employees of a train in the discharge of their duties, nor shall it be construed to apply to such freight trains as carry passengers.

Separate sleeping and chair cars.

1193 Carriers may haul sleeping or chair cars for the exclusive use of either the white or African race separately, but not jointly.

Short Lines.

1194 On all lines of railway less than thirty miles long, passenger coaches may be divided by partition.

Duty of Officers.

1195 The officers of such passenger trains and the agents at such depots shall have power, and are required to assign each passenger or person to the coach or compartment or room used for the race to which such passenger or person belongs.

Penalty.

1196 Any passenger or person insisting on going into a coach or compartment or room to which by race he does not belong shall be liable to a fine of not less than ten dollars nor more than two hundred dollars, and any officer of any railroad company assigning a passenger or person to a coach or compartment or room other than the one set aside for the race to which said passenger or person belongs shall be liable to a fine of twenty-five dollars.

Duty of Passenger.

1197 Should any passenger refuse to occupy the coach or compartment or room to which he or she is assigned by the officer of such railway company, said officer shall have the power to refuse to carry such passenger on his train, and should any passenger, or any other person not passenger, for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room, said agent shall have the power, and it is made his duty, to eject such person from such room,

and for such acts neither they nor the railway company which they represent, shall be liable for damages in any of the courts of this State.

Railroad's noncompliance—Penalty.

1198 All railway companies that shall refuse or neglect to comply with the provisions and requirements of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction before any court of competent jurisdiction, be fined not less than one hundred dollars nor more than five hundred dollars, and every day that such railway company shall fail to comply with the provisions of this act, and every train run in violation of the provisions hereof, shall be a separate offense; and any conductor or other employees of such passenger train having charge of the same or any agent at such depot who shall refuse or neglect to carry out the provisions of this act shall, on conviction, be fined not less than twenty-five dollars nor more than fifty dollars for each offense.

Posting law.

1199 All railroad corporations carrying passengers in this State, other than street railroads, shall keep this law posted up in a conspicuous place in each passenger coach and waiting-room.

Races defined.

1200 Persons in whom there is a visible and distinct admixture of African blood shall, for the purposes of this act, be deemed to belong to the African race; all others shall be deemed to belong to the white race.

Freight Trains.

1201 The railroad companies shall not be required to furnish separate coaches in freight trains for the white and African races. Act February 21, 1893.

BLANK PAGE

APPENDIX C.

ABSTRACT OF EVIDENCE ON BEHALF OF THE COMPLAINANT.

ARTHUR W. MITCHELL, the complainant, testified as follows: My home address is 3806 South Parkway, Chicago. I am a lawyer, and member of the Congress of the United States. Have been a member of Congress since the 3rd of January, 1935, and am now serving my second term in Congress (R. 70).

On April 20, 1937, I was in Chicago (R. 70). I left Chicago on a trip to Hot Springs, Arkansas on said date. I made personal arrangements for that trip during the day of the 19th or 20th. I called the Illinois Central Railroad office and made reservations for the trip. I made an effort to secure a bedroom from Chicago to Hot Springs. They did not have a bedroom available for the complete trip. I was provided with a bedroom over the Illinois Central from Chicago to Memphis, Tennessee.

I bought a first class round trip ticket, a part of which ticket I have now in my possession, that is the return part of the ticket which I did not use after the happening of this incident. This is the return part of the ticket which I bought to Hot Springs, Arkansas from Chicago for which I bought a bedroom from Chicago to Memphis. I have the stub for that bedroom.

(R. 71) Before I arrived in Memphis, knowing that the car I was in would not continue to Hot Springs, Arkansas, I was informed that there was a car attached to the

train on which I was riding that would go to Hot Springs I had the porter on the particular car which was enroute to Hot Springs to come back to my reservation on the car in which I had traveled to Memphis (R. 71). I was at this time perhaps eight or ten miles out from Memphis

The porter took my baggage consisting of two suit cases a large hand bag, brief case, and small hand bag, rain coat, top coat and umbrella and conveyed them to a good seat in the car that would go to Hot Springs, and assigned me to that car. At the time I purchased my railroad ticket I paid $27.70 for the railroad ticket and made a memorandum of the charges. I called for a first-class ticket and that was what the agent of the Illinois Central Railroad Company at Chicago sold me. It is marked first class. It was a first class round trip ticket from Chicago to Hot Springs, Arkansas.

The return portion of the ticket read by way of Memphis, Tennessee, returning over the Rock Island and Illinois Central to Chicago (R. 71).

(The return portion of the first class round trip ticket purchased by the complainant in Chicago was marked Complainant's Exhibit 1 for identification.)

Examiner Disque: He has never turned that in for refund, has he?

Mr. Westbrooks: No, he has not. We are still entitled to refund.

(Exhibit 1 for identification was then offered in evidence as Complainant's Exhibit 1 and there being no objection the same was received in evidence and a photostatic copy of the exhibit was filed in lieu of the original.) (R. 204-A.)

The Witness (continuing): I purchased and paid $7.50 for the Pullman ticket and I had to pay an additional

$1.65 because I occupied the bedroom alone. This money for the Pullman ticket was paid at the Illinois Central station to the same agent of the Illinois Central Railroad Company to whom I had paid the money for the first class round trip railroad ticket.

Both tickets were purchased in Chicago, Illinois (R. 73), the total amount paid by me to the ticket agent of the Illinois Central Railroad Company at the Illinois Central Railroad station in Chicago was $36.85, and these are the figures of the agent made on this envelope which he gave me at the time I purchased both tickets.

(Complainant's Exhibit 2 marked for identification was the passenger's coupon or stub for Pullman accommodations from Chicago to Memphis, Tennessee.)

The Witness (continuing): The original railroad ticket purchased by me is No. C-2649 and is the unused portion of the ticket from Hot Springs to Memphis and from Memphis to Chicago. The Pullman ticket is No. 951 and reads from Chicago to Memphis (R. 73), Compartment C, Car No. 227, for one passenger, marked April 20, 1937.

(Complainant's Exhibit 2 was received in evidence.) (R. 204-B.)

The Witness (continuing): When I said I had purchased a bedroom, that was Compartment C as was indicated by this ticket (Complainant's Exhibit 2). The accommodations used by me from Chicago to Memphis, Tennessee in the Pullman car was Compartment C.

The $1.65 extra that I paid was in excess of the round trip ticket which cost $27.70.

After I had paid for my railroad ticket and Pullman accommodations I occupied the compartment in the Pullman car on the Illinois Central Railroad until the train

upon which I was riding was about ten miles from Memphis, Tennessee. There were other first class passengers riding in the same Pullman car in which I occupied the compartment.

I had the porter on the Pullman car on which I was riding get the porter on the Pullman car which was going through to Hot Springs and have a reservation made from Memphis to Hot Springs. The porter on the car in which I occupied the compartment had told me that the through Pullman car to Hot Springs, Arkansas, and which was attached to the train on which I was riding, would be in charge of that porter as there was no Pullman conductor he would go through to Hot Springs.

The porter on the through Pullman car to Hot Springs came back to the compartment occupied by me when the train on which I was riding was about eight or ten miles from Memphis and before we had reached Memphis, Tennessee, that is on the through Pullman car to Hot Springs, Arkansas (R. 75), said that he had "plenty of space in the through car." He made two or three trips from the through Pullman car to the Pullman car in which I was riding and conveyed all of my baggage to the through Pullman car destined for Hot Springs, Arkansas, and which was attached to the train on which I had left Chicago.

The porter on the Hot Springs Pullman car then took me to the through Pullman car and assigned me to a space which he told me I could occupy. He said he would take up the fare as soon as we had left Memphis.

I left Chicago on Train No. 3 about 6:05 P. M. and arrived in Memphis, Tennessee the next morning around

eight o'clock. Train No. 3 is a daily train called the "Louisiane."

(Complainant's Exhibit 3 was marked for identification. It is one of the folders, time tables and schedules issued by the Illinois Central Railroad Company.) (R. 76, 205-207).

The Witness (continuing): Complainant's Exhibit 3 is similar to one of the folders I received at the Illinois Central station in Chicago at the time I purchased my ticket. It is a time table issued December 31, 1936.

(Exhibit 3 was admitted in evidence and shows that the Daily Louisiane left Chicago at 6:05 P. M. for Little Rock, and Hot Springs, Arkansas. Page 2 shows that this train arrives in Memphis, Tennessee at 8:20 A. M. (R. 76) and connects with the Chicago, Rock Island and Pacific Railroad at Memphis, Tennessee with Train No. 45 which leaves Memphis, Tennessee daily at 8:30 A. M. and is due to arrive in Hot Springs, Arkansas at 1:05 P. M. It further shows the equipment of Train No. 3 on page 5. The equipment consisted of sleeping cars, Chicago to New Orleans and Houston, Texas, 10-section drawing room connecting with Southern Pacific No. 3, New Orleans to Houston; Chicago to Hot Springs, Arkansas, a 10-section, 2-compartment drawing room which connects with the Rock Island No. 45 at Memphis, Tennessee for Hot Springs, Arkansas; also Cincinnati and Louisville to New Orleans, a 10-section, 1-compartment drawing room, connecting with Baltimore and Ohio No. 63 at Cincinnati and Louisville; Pullman sleeping cars, air conditioned diners, air conditioned buffet lunch car, radio, Chicago to New Orleans; coach cars air conditioned, chair cars, Chicago to New Orleans, air conditioned; all regularly assigned cars on this train were air conditioned.) (R. 76).

The Witness (continuing): The Pullman car in which I rode out of Chicago was in accordance with the tickets

which I had purchased and the accommodations were first class. The Pullman car to which my baggage had been removed just before I reached Memphis, and to which I had been assigned by the Pullman porter, was enroute to Hot Springs, Arkansas. The description of the Hot Springs Pullman car was described by you when you read the booklet (Exhibit 3). It had several sections and a drawing room. It had a smoker for men, and running water. I went into the smoker and smoked. It had all the accommodations of the Pullman car except bedrooms (R. 77). This Hot Springs car had sections. The upholstering in the Pullman car to which I was transferred compared favorably with the upholstering of the Pullman car from which I was transferred. The upholstering was clean. There was clean linen and everything in the way of accommodations that Pullman cars ordinarily carry. There was porter service in both Pullmans. They were both air conditioned.

There was soap such as Pullman cars ordinarily use, of high quality (R. 78). The toilets were clean. There was running water in the toilets and the washbowls. There were clean towels, hot and cold water, and mirrors. Both Pullman cars contained water for flushing purposes in the toilets. I use Pullman cars quite often and both Pullman cars were equipped the same as all Pullman cars I have had occasion to use. I am describing the Pullman car in which I rode from Chicago to a few miles before we reached Memphis, and the Pullman car into which I was transferred just before we reached Memphis.

There were no obnoxious odors in the toilets as they were properly disinfected. I rode in the Pullman car enroute to Hot Springs, Arkansas, until after the car left Memphis, Tennessee (R. 78). After we left Mem-

phis, Tennessee and had gotten a little distance towards Hot Springs, Arkansas, the conductor of the train and the Pullman porter came to me.

I offered my first class railroad ticket and the train conductor received the ticket, tore off a piece of it and told me at that time that I could not ride in that Pullman car in which I was riding. The conductor said to the porter: "This man can't ride in this car." This was the train conductor on the Rock Island Railroad.

After we had left Memphis, Tennessee and crossed into Arkansas, we had gone a distance of seven miles into the State of Arkansas. After the train conductor told me I could not ride in the Pullman car in which I was riding I thought it might help the situation by telling him who I was, and said: "I am Mr. Mitchell, serving in the Congress of the United States" (R. 79).

The train conductor said, "It don't make a damn bit of difference who you are as long as you are a Nigger you can't ride in this car."

The Pullman porter was doing all he could to arrange for my transportation in the Pullman car. The conductor in a very arrogant and nasty manner said I had better be gone when he came back. Realizing that I was in the State of Arkansas and that sometimes persons arrested are not kept in jail for trial but are taken from the jail and lynched, I decided not to create any disturbance.

When the porter returned I requested that he talk with the train conductor and see if arrangements could not be made to permit me to ride in the smoking room of the Pullman car in which I was riding. There was nobody occupying the smoking room of the Pullman car.

There were at least four or five sections in this Pullman car in which I was riding which were unoccupied (R. 80). There were one or two other people riding in the Pullman car. There was a white man to the right of me and in front of me who gave some attention to the controversy. He did not say anything about it. The train conductor had used abusive language to me in the presence of the other passengers in this Pullman car. The other passengers heard what was being said and saw the entire transaction.

The Pullman car in which I was riding was not crowded. After riding in this Hot Springs Pullman car for about ten or fifteen miles in the State of Arkansas the Pullman porter returned and said, "Well, I just can't do anything with this man." (Meaning the train conductor.) "He says you can't ride." The porter was referring to the train conductor. The porter then said, "The train conductor says you can't ride in the smoker of this Pullman car." The Pullman porter stated that he knew who I was but he was helpless.

The conductor told me that in Arkansas they would put both of us in jail and fine us $50 apiece if I rode in the Pullman car which provided first-class accommodations (R. 80).

Under the threat of being thrown in jail for receiving first-class accommodations for which I had paid, I was compelled to leave the Pullman and ride in the Jim Crow car to complete the journey to Hot Springs, Arkansas. My baggage remained in the Pullman car until the train reached Hot Springs. I was deprived of the use of all of my baggage until the train reached Hot Springs.

The train conductor after taking up part of my first-class ticket, did not offer to make any refund after I had

been compelled to accept second-class accommodations. The conductor had no business to tear my ticket as he was only supposed to punch the ticket and return it to me.

About halfway to Little Rock, Arkansas, he returned the torn portion of my ticket and said, "Of course, this ticket entitles you to have first-class accommodations but under the law of the State of Arkansas you can't have them, and they have a right to give you back the difference between the price of the ticket and a regular coach ticket" (R. 81). The train crews changed at Little Rock and the piece of ticket which the first conductor had torn off and returned to me was taken up by the train conductor in charge of the train from Little Rock to Hot Springs. I offered to pay for the extra accommodations, that is, the seat in the Pullman car and I had the money in my hand when I offered the ticket to pay for this Pullman accommodation on to Hot Springs, and they refused to accept it.

Although I had a first-class ticket and was entitled to first-class accommodation he told me I would have to ride in the Jim Crow car. He told me that before I was put out of that Pullman. I protested about being put out of the Pullman car and he threatened to have me arrested (R. 81).

The Jim Crow car was an old car up next to the engine, in front of all the other passenger cars. As I remember it it was into three, or into two compartments. A part of it was used for smoking passengers, a small section of it; separated by partitions, and by a door. I don't remember whether it was a swinging door, or just an ordinary door; and a separate section of this car was used for non-smoking passengers, men and women. The car was in filthy condition. It was old and poorly ventilated; no linen of any kind; no running water; a filthy toilet that emitted obnoxi-

ous odors; no wash bowl or any convenience where a man or a woman could wash their hands; no towels or linen of any kind; no soap, offensive smelling spittoons; part of this Jim Crow car was used by the conductor; he used two seats of it for his office. In fact, he and his flagman, his white flagman, used two seats of that part—not the part that was set aside for smokers, but the part that was set aside for the non-smoking passengers. He rode just across the aisle from where I sat all the way into Little Rock (R. 82).

The ventilation of the Jim Crow car was the type that they had in the old fashioned cars. You could get ventilation—they had some arrangement for ventilation at the top; it was not air-conditioned at all. That car was built before they knew anything about air-conditioned cars, I think. There was neither hot nor cold water for use in that part of the car, in the Jim Crow car, where I was compelled to ride. If there was any water for flushing the toilet the toilet was out of commission and could not be flushed that morning, because it was giving off a terrible odor. It might have been due to something caught up above. I don't want to say it wasn't; my recollection isn't clear on that, but I know it wasn't possible to flush it that morning. The toilet in the Jim Crow car was not flushed out at all from the time I went in there (R. 82). It was filled with offal. One or two ladies were in that portion of the Jim Crow car where I was. This little Jim Crow section wasn't crowed at any time. I believe they had separate toilets for men and women in this Jim Crow car. Ordinarily they do not. In a great many of them, in the south, they do not have them separated. I was down south two weeks ago—

As to this one, I am not certain whether there were two toilets or one. I know there was only one in the compart-

ment where I was riding. There might have been one in the little section set off for smoking passengers (R. 83). In the compartment in which the ladies were riding there was only one toilet. The smoking compartment of this same car was used as a smoker for colored passengers. There were white in it, too, but I think the purpose of it was—it was designated for colored, but there were white riding in it. They had a sign I think "For Colored." The train conductor had charge of that train from Memphis to Little Rock.

I recognize what you show me as Complainant's Exhibit 4, as the folder given me by the Rock Island which is a time table corrected January 24, 1937 (R. 84). That covers that train service.

(Complainant's Exhibit 4, being a Rock Island time table corrected January 24, 1937, admitted in evidence.) (R. 84, 207-210).

I was not permitted to ride in the observation parlor car as I should have been permitted according to page 6 of the Rock Island time table (R. 85). I had the fare and was ready to pay it and offered to pay it for this permission. I was ready and willing and able to pay for and ride in the first-class coaches or cars. I saw other first-class passengers riding in them and they were all white people. I did not see any colored person at all riding in that observation car as passengers. They have a sleeping car from Memphis to Hot Springs, ten sections, one drawing room and two compartments, from Chicago, Illinois Central No. 3 (R. 85). That was the car I was ejected from. I did not see any colored passengers in that car. I was told by the conductor that they could not ride in it, and because I was colored, I could not ride in it. And that was the only reason he told me that I could not ride in

ere. Absolutely because I was colored. He said this: e said, "The law of Arkansas has made it a crime for a egro to ride in a car of that type, in the presence of white eople; and that they would have to ride in compartments, r drawing rooms; that they couldn't ride in the car." his car that I was in, as a further description of it, that , the car I was ejected from was of the modern type, ith those separations between the sections. It was not ne old type, where they used to put up ordinary wooden ards between the sections when they got ready to make wn the berths (R. 86).

It was one of the modern steel cars with these sections hat stay permanently fixed, with these separations, or ose partitions, they are permanently fixed between the ctions; and I always rode in a section. I was trying to y a section at the time when they ejected me, so I uldn't have contact with anybody else.

(Complainant's Exhibit 4 shows that "passengers holding coach tickets (not special coach) who desire to use sleeping car or parlor car have their rail tickets made valid for passage in sleeping car or parlor cars, on payment of difference between the one way first-class rail fare and the one way coach fare" (R. 86-87). Additional fare will be charged for the service of the sleeping and parlor cars. "Tickets designated 'special coach' will not be honored in sleeping or parlor cards" (Exhibit 4, page 12).)

The Witness (continuing): I arrived in Hot Springs, Arkansas, about 1:00 o'clock P. M. (R. 87).

(Page 32, Exhibit 4, also advertises the fact that coach tickets may be changed to first-class tickets. Exhibit 4, page 33, shows the Pullman car rates and provides that if a person has only one ticket, an extra fare is charged for occupancy of a compartment.)

When I was ejected from the sleeping car, a first-class accommodation, I was very sick and had been advised by my physician that I was suffering from low blood pressure (R. 88). We had been in a terrible fight in Washington, over the passage of Anti-Lynching Bill, and I was going to Hot Springs, for the purpose of building up my health. At the time I left Washington, D. C., I was sick and the records will show that I was excused because of illness (R. 38). I informed the train conductor of the illness before I was ejected. I arrived in Hot Springs in the Jim Crow car used for the transportation of persons holding second-class tickets, although I had paid for a first-class fare and accommodations. I remained in Hot Springs for about sixteen or seventeen days during which time I went down to the station and looked at Train 45 more than a half dozen times. It was a sort of custom for the patients at the hotel and bath house where I was stopping to visit the station on the arrival of this train to see who was coming to Hot Springs. That is, the new arrivals. I saw the Pullman cars used by first-class passengers attached to this train. I did not see any colored people riding as passengers in those first-class cars, that is, Pullman cars on the Rock Island (R. 89). The Rock Island refused me a ticket to return to Chicago, I mean, the agents of the Rock Island, in Hot Springs, refused to sell me first-class accommodations in the Pullman car from Hot Springs to Chicago, and that is why I have this unused portion of the first-class ticket which I purchased in Chicago, and I returned over the Missouri Pacific by paying first-class railroad fare and the additional charges for Pullman service. I have the unused portion of my ticket photostated (R. 89).

The condition of the car in which I saw the colored passengers riding, that is the Jim Crow car, was the same as I have heretofore described and was an antiquated railroad

car used for diversity purposes. The upholstering was very poor and worn and there were no towels. In the first-class car they have white towels on the back of the seats; they have them in all the Pullmans and in some of the coaches, but not in the Jim Crow car. In fact, there is no effort made by this railroad company to give Negroes equal accommodations. I saw the same kind of a Jim Crow car come into Hot Springs, Arkansas, on that train (Train 45) each day I was there and I have been observing the same condition for the past twenty-five years, there has been no change worth speaking of during that time. Not only have I been there and seen it, but I have been riding in it for that length of time as late as two weeks ago (R. 90).

I have a suit filed in the Circuit Court of Cook County against each of the defendants in this case, No. 37-C-5529 (R. 90-91). Exhibit 5, for identification, is an identical copy of the verified answer filed by Frank O. Lowden *et al.*, in the Circuit Court.

(It was stipulated that Paragraphs 16, 17 and 18 of the answer be read in evidence in this proceeding (R. 92). Paragraph 16 admits that the complainant was riding in the Pullman and was ejected by the train conductor; that the Pullman car was occupied by passengers of the white race; that the drawing rooms and compartments in the Pullman car was wholly occupied by other passengers; that the conductor was compelled under the laws of Arkansas, to assign plaintiff who was believed to be a colored person to this Jim Crow car (R. 93). Paragraph 17, claims that the conduct of the train conductor in compelling the complainant who had paid a first-class fare, to ride and accept second-class accommodations was in pursuance of the Separate Coach Law of Arkansas (R. 93).

Paragraph 18 *admits that the plaintiff was charged and paid for first-class fare from Memphis to Hot Springs, but that the defendants, Frank O. Lowden, et*

al., trustees of the Rock Island Railway Company, did not furnish the facilities and accommodations to the plaintiff for which the plaintiff paid and which was furnished other first-class passengers on the same train paying the same fare. It further admits that the plaintiff was overcharged the sum of $3.74 which was retained by the Rock Island.) (Emphasis supplied.)

When the porter on the Hot Springs sleeping car took me in the Hot Springs car he informed me that the drawing room was engaged and occupied as far as Memphis, Tennessee, and if the drawing room was not taken out of Memphis, I was to be given the drawing room upon paying the extra fare, which I was ready, willing and able to do (R. 93-94). He also told me that if the drawing room was engaged from Memphis to Hot Springs I could occupy a seat in the Hot Springs sleeping car from Memphis to Hot Springs. I rode about ten miles in this Hot Springs car with my baggage in a seat before I reached Memphis, and I remained in the same section until we had reached about fifteen miles the other side of Memphis, going toward Little Rock. Each section of this car had partitions and was the same as the modern Pullman cars are built.

(It was stipulated between the complainant and the defendant Pullman Company that at the time the complainant was ejected from the Hot Springs Pullman car by the train conductor that there were vacant and unoccupied seats in the Pullman car) (R. 95-96).

THOMAS J. PRICE, a witness for the complainant, testified (R. 97): I live in 3812 South Parkway, Chicago, Illinois. Have lived there about ten years. I have been engaged in the practice of law about thirty years, twenty years of that time I have spent in Little Rock, Arkansas. I am familiar with the transportation furnished by the Rock Island System as I had a newspaper called the "Ar-

kansas Times," and used scrip on the Rock Island Railroad for many years (R. 97). I am quite familiar with Train 45 which runs from Memphis, Tennessee, to Little Rock and Hot Springs, Arkansas. I am familiar with the class of facilities, service and accommodations furnished to colored people on that train, also, the accommodations and facilities on that train furnished to white persons as first-class passengers. The Rock Island had three types of car service, for Negro passengers. A car that they divided up in three sections, with black leather upholstery (R. 100). They had another combination in which they put the colored people next to the baggage, that was divided into two sections, a smoker and another section. They had a car divided into sections with ordinary upholstery, not a chair car. The last time I rode on the Rock Island Railway was about eleven months ago when I made these observations. From 1908 up to about eleven months ago I rode all over the State of Arkansas on the Rock Island Line. These conditions which I was describing have been existing during the period of time last mentioned by me. The accommodations furnished for all Negro passengers were not anywhere up to the accommodation furnished the white passengers (R. 101). I have ridden in the cars furnished white passengers and received the accommodations and facilities and also in the cars and accommodations furnished the colored passengers. On one occasion I went in the Jim Crow car. Seeing the car was dirty with peanuts and tobacco juice all over it, I went into the other coach where white passengers were riding. In the Jim Crow car there was a sign "For Negroes or For Colored," in the other car, there was a sign "For White." There were Negroes riding in the car where the sign read "For White."

In the Jim Crow car the ladies and men used the only toilet in the place, that is, the same toilet as there was

no other toilet in the car. There was no running water in that toilet to flush the hopper, no towels nor any washbowl in the Jim Crow car (R. 101). The Jim Crow car was usually covered with railroad dust from the engine and the toilet was filthy.

In the car or cars occupied by white passengers there were clean towels for use of the passengers, clean covers over the back of the seats or chairs, everything was nice and clean; good air circulation, washbowls, towels, soap and separate toilets for men and women. I always paid a first-class fare when I made the trips on the Rock Island (R. 102).

EDWARD H. CAREY, for the complainant, testified (R. 103):

I live at 4252 Vincennes Avenue, Chicago, Illinois; have been a resident of Illinois for seventeen years. Lived in Little Rock, Arkansas, for twelve years before coming to Chicago. Have used the Rock Island Railway for transportation and traveled extensively from Arkansas throughout the South from 1910 to 1920 (R. 103). Have traveled as a passenger on the Rock Island from Arkansas to Oklahoma and Illinois, and have returned from Chicago to Arkansas many times by way of the Rock Island Railway. Several times I made the trip from Memphis, Tennessee on Train 45 to Hot Springs. Have used and ridden in the cars used by white passengers and also I have ridden those used by colored passengers on the Rock Island, and I am familiar with the accommodation and facilities furnished by the Rock Island to both white passengers paying first-class fare and colored passengers paying first-class fare (R. 104). I always paid a first-class fare. The coach set aside for Negroes on the Rock Island Train No. 45, from Memphis to Hot Springs, was usually a coach next

to the baggage car and divided into two sections with poor accommodations as to cleanliness. One toilet and no washbowls, the one toilet was used by colored ladies and gentlemen.

In that part of the section where colored ladies were sitting, the train conductor would usually use four seats for his office (R. 105). In the part used as a smoker for men, the butcher would use part of that as a storehouse for his goods. Colored and white men were smoking in the part next to the colored ladies' compartment. There was only a little swinging door between the smoking compartment and the compartment occupied by colored ladies and gentlemen. The frequent passing through the swinging door would permit smoke to fill the compartment occupied by the colored ladies. I observed this happening quite often. In this compartment or Jim Crow car there was no soap, no running water, no hot and cold water, no water for flushing the toilet, prisoners were often carried in this compartment used for smoking (R. 105). The prisoners were both white and colored.

During the many years of travel on the Rock Island I have never seen any white or colored prisoners being carried in the coach set apart for white passengers, in the first-class accommodations furnished white persons holding first-class tickets (R. 106). There weren't any foot-rests in the Jim Crow car, no carpets on the floor, the cuspidors in the compartment used by colored ladies were usually very filthy. The accommodations furnished white passengers were usually very clean and well kept, covers on the back of the seats which were very comfortable, the upholstering was of green or red plush, there was plenty of running water, hot and cold water, clean towels, soap, clean washbowls (R. 107). Usually a whole coach was set aside for white passengers for smoking purposes of

white passengers holding coach tickets (R. 107). When I say coach tickets, I mean second-class tickets. The coaches were provided by the railroad company. I do not mean the Pullman cars. I have ridden on the Pullman cars on the Rock Island in the State of Arkansas, these Pullman cars are usually supplied with everything to make passengers comfortable (R. 108). The upholstering is first-class, first-class berths, soap, towels, washbowls and tables. There are observation cars and lounging compartments. I have purchased Pullman accommodations in Arkansas, if I went on the side used by white persons to purchase a ticket, and if I went on the side specified for colored persons to buy ticket the Rock Island ticket agent would refuse to sell me Pullman or first-class accommodations in the observation car belonging to the railroad company (R. 108). *The Rock Island agent told me on many occasions that he could not sell Pullman accommodations to Negroes. There would be Pullman cars and observation cars used by passengers holding first-class tickets, attached to the train with space unoccupied. But because I was colored I was refused the accommodations.* I always purchased first-class railway ticket and was financially able and willing to pay for the use of first-class accommodations and facilities. (Emphasis supplied.)

William Harrison, for the complainant, testified (R. 109): Lived in Chicago about nineteen years; had previously lived in Oklahoma. Have held various offices in Illinois and Oklahoma. Was assistant attorney general and member of the board of pardons and paroles in Illinois, and Special Judge in the State of Oklahoma. That he had traveled over the Rock Island System in the State of Arkansas, Oklahoma and as far west as the Pacific coast (R. 110). Prior to April 20, 1937, and subsequently to said date. That he was familiar with the accommodations

and facilities furnished by the Rock Island on Train 45, to colored and white passengers. He always paid for a first-class ticket (R. 110). He described the Jim Crow coach as being next to the baggage car with a smoker used for white coach passengers or second-class passengers as part of the same car. The toilet in the colored compartment of the car was used by both men and women as there was only one toilet. The upholstering was leather and part of the compartment called the Jim Crow car was used by the conductor and the news butcher, each occupying about two seats. This condition described by this witness existed from 1904 to 1916. Colored men smoked in the compartment where colored ladies were compelled to ride, sometimes there was a middle compartment where colored were permitted to smoke. The conductor, flagman and brakeman also smoked in the Jim Crow car (R. 111). The Jim Crow car was filthy; cuspidors were unseemly and emitted odor.

In coaches occupied by white passengers, riding on the same train there were clean covers on the seats and the car was well kept. The Jim Crow car was in no wise equal in point of comfort and convenience. This description was of Train No. 45, which ran from Memphis, Tennessee, through Little Rock, Arkansas, and on to Hot Springs. There were signs in the Jim Crow cars "For Colored Persons or For Negroes" (R. 112). There was no running water in the Jim Crow car with which to flush the single toilet. The first-class accommodations on Train No. 45 furnished to white passengers included the use of the Pullman cars, running water, clean towels, soap and clean washbowls (R. 112). The cuspidors were clean, the smoking room was kept clean. After purchasing a first-class ticket from the Rock Island ticket agent in Hot Springs, Arkansas, *I applied for Pullman accommodations*

for which I was financially able to pay and offered to pay, but the agent refused my application because I was colored (R. 114). (Emphasis supplied.)

I always bought a regular ticket before making application for Pullman accommodations from Hot Springs, Arkansas, to Chicago, Illinois (R. 113).

JOHN J. PULLEN, for complainant, testified he lived in 4314 Forestville Avenue, Chicago; had practiced medicine thirty-nine years, in Alabama, Tennessee and Arkansas (R. 115). Have lived in Chicago, about eighteen years. As a property owner in Hot Springs and Little Rock, Arkansas, he has frequently made trips on the Rock Island Railway (R. 81). Always paid a first-class fare and was familiar with the accommodations furnished to both white and colored passengers. Have used both accommodations on the various trips. In using the first-class accommodation furnished white passengers by the Rock Island, in Arkansas, I observed that the cars had running water in the toilets, soap, combs and brushes in some of the compartments and everything strictly modern (R. 116). This was the coach and chair cars furnished to white passengers. The Jim Crow car set apart for colored passengers contained very poor accommodations. There was no water to flush the toilets, no towels, no washbowls, most of the time, if there was a washbowl it would be covered with soot and cinders (R. 116-117). The Jim Crow car sometimes had one partition and sometimes two partitions. Parts of the Jim Crow car was used for smoking. I have observed drunken men of the white race being brought out of the car used by white passengers into the Jim Crow car where colored ladies were riding and the drunken men would heave all over the seats. The conductor and flagman also occupied seats in the compartment set apart for colored ladies and gentlemen.

I made a trip from Chicago to Hot Springs by way of Memphis and over the Rock Island lines, September, 1937, I found the conditions the same as I have described in relation to the accommodations furnished colored passengers and white passengers (R. 117-118). I paid first-class fare, but was compelled to accept second-class accommodations by the train conductor (R. 119). When I say first-class ticket or first-class fare, I mean the price I paid for the ticket was the three-cents-a-mile rate, the second-class ticket is what is commonly known as the two-cents-a-mile or coach ticket (R. 119-121).

ELIAS A. MORRIS, for the complainant, testified he lives at 4171 South Parkway, Chicago, have lived in Chicago sixteen years. I lived in Arkansas, before coming to Chicago, and was a federal employee (R. 121-122). Have returned to Arkansas from Chicago, by way of Memphis, Tennessee, several times since living in Chicago. I always purchase a first-class ticket (R. 122). Have ridden in both chair cars and sleepers from Chicago to Memphis. The Pullman cars are very well furnished, plush backs for the seats, a smoking room with a lavatory off from the smoking room and with proper necessities for keeping it clean. Running water, hot and cold water, towels, soap, carpets on the floor, porter service, berths, tables for use by passengers (R. 122-123). Sanitary, well lighted with all modern conveniences (R. 123). I have ridden in the car set apart for colored people on this Train No. 45 of the Rock Island, which leaves Memphis, about 8:30 each morning. It is a coach divided into, at least, two sections, one for colored passengers, the other for a smoking compartment, one lavatory in the colored compartment used by men and women, no soap, no towels or anything of that kind. I am describing the part of the Jim Crow car used by colored ladies. The washbowls were filthy, no hot or cold water

in the wash bowls (R. 123-124). The door between the part of the Jim Crow car used for smoking and that part occupied by colored ladies was frequently opened, and rolls of smoke would enter the part of the Jim Crow car in which colored ladies were riding. I saw signs "For Negroes or For Colored."

The sections of the Arkansas Statute providing for "The quality of Accommodations" was read in the record and may be quoted as follows (R. 127, 211-213):

> "SEC. 986. All railway companies carrying passengers in this State *shall provide equal,* but separate and sufficient accommodations for the whites and African races, by providing two or more passenger coaches for each train."

The provisions of the Arkansas Law concerning "Separate Sleeping and Chair Cars" provides (R. 127, 211):

> "SEC. 989. Carriers may haul sleeping or chair cars for the exclusive use of either the white or African Race separately, but not jointly."

Evidence on behalf of the defense.

ALBERT W. JONES, for the defense, testified on direct examination. I live at 711 East Sixth Street, Little Rock, Arkansas (R. 128). I am the railroad conductor employed by the Chicago, Rock Island Railroad Company. Have been running a passenger train for thirty-two years (R. 128). I have been in charge of the Rock Island passenger train between Memphis, Tennessee, and Hot Springs, Arkansas, for five or six years. And I had charge of Rock Island Train No. 45 at the time the complainant was put out of the Hot Springs Pullman car into the Jim Crow car (R. 129-130). Train No. 45 consists of a baggage car, combination coach, straight day coach, diner, sleeper and

parlor car (R. 130). The combination coach is next to the baggage car, the entire equipment is owned by the Rock Island except the Pullman sleeper. On April 1, 1937, I saw Congressman Mitchell in the sleeping car (R. 130-131). I received the railroad transportation from Congressman Mitchell while he was in the Pullman car and he had a dollar in his hand for the porter of the Pullman car. I asked him if he had a through sleeping car. He said, "No." I said: "Well, we can't accept your dollar, *unless the porter has a compartment* or *stateroom* that he can put you in." The porter said he did not have a compartment or stateroom and I said to Congressman Mitchell, "You will have to go to the colored car." He said: "They told me in Chicago, that I wouldn't have any trouble getting first-class accommodations for the entire trip." I said to him, "The law doesn't make any provisions for a Congressman, any more than it does for anybody else" (R. 131). The porter said: "He is Congressman Mitchell from Chicago." I said, "I can't do anything for you. I can't accept this Pullman fare, etc." The congressman walked into the Pullman and sat down, I think in Section 3. (Emphasis supplied.)

After I finished checking the berths and returned to where the congressman was, he asked me what I was going to do with his ticket. I said, "I will make a notation and you can get a refund of one cent per mile." He said, "I don't want your refund, I want the service." I said, *"I can't give you the service."* When I came back after working my parlor car the congressman had gone up in the other car. He was in the middle compartment, next to the ladies' toilet (R. 131). When I first saw the congressman I was about nine miles from Memphis, in the State of Arkansas. I rode in the colored end of the car from Forest City to Memphis, I mean from Forest City

to Little Rock, a distance of about eighty-seven miles (R. 131-132). It is 133 miles from Memphis, to Little Rock. The middle compartment is devoted and used by colored women, colored *men may use it,* but it is called the colored women's car. (Emphasis supplied.)

The car in which the congressman was riding was of solid steel with three partitions (R. 131). The front end is used for a colored smoker, the middle for colored men and women, the rear for a white smoker. There were three toilets one in each compartment. The only water toilet is the middle toilet (R. 133). Paper towels and a wash basin. The other two toilets do not flush, but are dry toilets. The toilet in the middle compartment is used by both colored men and women (R. 134). During the time I was in the Jim Crow car I did not detect any foul odors (R. 134). The colored car is cleaned and renovated at Memphis, but I do not know the nature of the cleaning. It looks clean and nice. The spittoons look clean and have some kind of disinfectant in them. I did not notice any dirt, peanuts, tobacco juice or anything else on the floor. There are leather seats with seat covers. And for the past five or six years, linen back covers have been used (R. 134-135). There is an electric fan in each compartment and ventilators that you pull open and close with a ventilating stick.

On this day, the incident happened, I maintained my office in the forward part of the colored car where I occupied two seats with my grip, tickets, envelopes and other working material (R. 135-136). There were about five or six colored passengers in that car (R. 136-137). The seating capacity in the two compartments devoted to colored passengers is about forty-two. There was no news butcher on that train. There were three coolers with ice-water. To the best of my knowledge there was ice-water in the

coolers (R. 137). In the thirty-two years of my experience I have handled about ten or twelve cases of this kind (R. 138). I mean, cases where I have put colored people out of the sleeping cars because they were colored, and had them occupy the Jim Crow car. Colored persons can't use the Pullman car on this train (R. 138). They may occupy a drawing room or compartment, but they can't ride in the body of the car.

In my conversation that morning with the congressman he was very gentlemanly (R. 143). He never went out of his way, never talked noisy, he was very nice. He did not use any insulting language, nor any abusive or profane language. His voice was not loud nor raucous (R. 143). The Pullman car came from Chicago, en route to Hot Springs.

If a white passenger desires to ride in the observation car, he must have a "three-cent-per-mile" ticket, or a first-class ticket as you call it (R. 158). And if the white passenger only has a "two-cent-per-mile" ticket or second-class ticket, he can only ride up in the half of the Jim Crow car. And cannot ride in the Pullman car (R. 158). *The only provision that the Rock Island has for carrying all colored passengers is in the part of the Jim Crow car.* A colored person who has a first-class ticket is compelled to ride in the Jim Crow car with all other colored persons who have second-class ticket or "two-cent-per-mile" tickets. A white person with a first-class ticket is entitled to use the Pullman, the diner and the observation car, which provide first-class accommodations (R. 158-159). *The Rock Island Railroad Company has no such first-class accommodation for Negroes, although the Negroes may have first-class tickets on the Rock Island Railway or "three-cent-per-mile" tickets. During the thirty-two years I have worked*

over there in Arkansas, for the Rock Island Railroad Company it has never had any first-class accommodations for Negroes (R. 159-160). And they haven't any first-class accommodations in the sleeping cars for Negroes now. (Emphasis supplied.)

The Rock Island Railroad Company does not at this time have any first-class accommodations for colored passengers paying the "three-cent-a-mile" fare permitting them to use the observation car which belongs to the Rock Island. They cannot use the dining car, nor sleeping car, although they may hold first-class tickets (R. 160).

On April 21, 1937, Congressman Mitchell had a "three-cents-per-mile" ticket, or what they call a "first-class" ticket (R. 161). There was plenty of room in the observation car on that day. I did not inform the congressman that he could ride in the observation car by paying the same additional fare of white persons holding first-class tickets (R. 161). The seat fare in the observation car from Memphis, to Hot Springs was ninety cents and the dollar which Congressman Mitchell had in his hand at the time he was ejected from the Pullman car would have been more than adequate to have paid for a seat in the observation car. The same fare is charged for a seat in the Pullman car from Memphis, to Hot Springs (R. 162).

Congressman Mitchell was sitting in Section 3 of the Pullman car alone (R. 162). I do not know if anyone occupied Section 3 from Memphis, to Hot Springs on April 21st, but whether the space had been sold or not, I would not have sold a seat, Section 3 or any other space in that Pullman car to Congressman Mitchell, *because he was a colored person.* I know he had a first-class interstate round-trip ticket from Chicago, Illinois, to Hot Springs, Arkansas (R. 163).

The accommodations furnished to Negro passengers in the Jim Crow car where Congressman Mitchell was compelled to ride are not equal to the accommodations furnished in the observation car by the Rock Island Railway to white passengers holding first-class tickets (R. 164-165). (Emphasis supplied.)

There is porter service furnished to the passengers in the observation car but no porter service furnished to the colored passengers in the Jim Crow cars (R. 165).

The Jim Crow car which all colored passengers were compelled to ride in in April, 1937, had three compartments (R. 165). There was no running water, no wash basins or towels. There were only paper towels furnished in the compartment of the Jim Crow car but linen and paper towels were furnished in the observation car (R. 165-166). There was only one toilet in the compartment where Congressman Mitchell was riding in the Jim Crow car, which was "for women." There was none for men who were riding in that compartment (R. 166). I never used for my office any seats in the white smoker. I used the seats in the colored compartment (R. 167). There is only a runner on the floor of the Jim Crow car now, while on the floor of the Pullman and observation car carpet is used to cover the entire floor (R. 168). In the Jim Crow car where Congressman Mitchell rode there were only leather seats. When I said that the Jim Crow car was "now in first-class condition" I meant that it was "clean" (R. 168).

I have never sold any colored person any space or accommodations in the Pullman car during my entire service. I inspected the toilet in the Jim Crow car at Memphis, but did not look in there at any time afterwards (R. 169). The toilet did not have any water to flush the hopper, from the time the train left Memphis until it reached the destina-

tion (R. 170-171). I stated on direct examination that I had no instructions from the Rock Island Company. But I had charge of the train as the conductor for the company and having charge of the train for the company I felt it was my duty to put the congressman out of the sleeping car into the Jim Crow car (Rec. 168). The congressman did complain and protest being put out of the Pullman car. He showed me his ticket and offered to pay for the accommodations. *But I told him he was a colored man and couldn't ride in those first-class accommodations. If there had been a white passenger with a first-class ticket who had boarded the train at Memphis, for Hot Springs, and had asked for a berth or a seat in that Pullman car, where there were vacant seats or had asked for a seat in the observation car, I would have sold it to him. I do not know how many colored people apply for Pullman tickets in Hot Springs, for Chicago, and are refused* (R. 71). (Emphasis supplied.)

If the compartments or stateroom are occupied, no colored person can ride in the body of the sleeping car. *No colored persons are allowed to ride in the observation car which belongs to the Rock Island,* even if they have first-class tickets. Those are the rules of the railway company and I follow the rules. I sell space on that train for seats in the observation car but would not sell a colored person any accommodations in the observation car, although he had a first-class ticket (R. 172). The white people and colored people are charged the same fare for the "three-cent-per-mile" ticket, or the "first-class" tickets (R. 173). There is no difference in the charge for the ticket because of color. The Pullman car is better equipped than the Jim Crow car. *If a white passenger with a first-class ticket was put out of the Jim Crow car he could receive the first-class accommodations of the Pullman car, and would not be compelled to purchase a compartment or a seat in the*

compartment. He could buy a seat in the Pullman car or observation car, or parlor car. The only requirement is, his having a first-class or "three-cents-per-mile" ticket (R. 173-174). *The day coach has no partitions and is occupied by white people who only have a second-class or "two-cents-per-mile" ticket. They have the entire car* (R. 174). Colored people cannot ride in that car, even if they have a first or second-class ticket. *All of the colored people who ride on my train must stay in the Jim Crow car, no matter what kind of a ticket they have.* We now have one partition in the Jim Crow car half for white and half for colored people. The colored men and women occupy the one compartment and if there is any smoking by the colored men or women it must be in that same compartment (R. 175). That is the only accommodation the Rock Island now has for colored people who pay first-class, or "three-cents-per-mile" fare (R. 176). (Emphasis supplied.)

The day coach used for white people has one toilet at each end, no smoking is allowed in this coach, there are plush seats, a runner on the floor and paper towels (R. 176). Only white people can go in the diner which is operated by the Rock Island, between Memphis and Hot Springs, on Trains 45-50 (R. 177).

If I was not the conductor and an employee of the Rock Island Railway I would not undertake the moving of colored people from one car of the train to the other (R. 178). Oh, I get what you mean now. No I meant, *I was enforcing the law, not the rules of the company. It is not the rules of the company. It is the law,* that I am enforcing, and not the rules of the company, because I have never had any instructions from anyone on the railroad as to just how to handle these cases, so that it was left up to me. (Emphasis supplied.) But as the conductor and in charge of the train, I consider that as one of my duties. When I

stated that there was smoking all over the train, I did not mean in the body of the Pullman car (R. 179). They do not allow any smoking in the body of the Pullman car (R. 179).

W. S. Scott, for the defense testified (R. 180): I live at 201 Mill Street, Malvern, Arkansas. In April, 1937, I was employed as brakeman on the Rock Island and assigned on Train 45 as the head brakeman. On April 21, 1937, I saw Congressman Mitchell in the middle compartment of the Jim Crow car on my train (R. 180). The train runs from Memphis to Little Rock, in two hours and forty-five minutes (R. 181). There was no running water in the toilets of the smoking end of the Jim Crow car used by colored passengers. And if the toilet was used it would stay dirty until the train reached Hot Springs, Arkansas. I don't know if they wash the toilets in Hot Springs or Little Rock or any other place (R. 184-185). They have a coach cleaner who goes through and cleans the inside of the coaches, but the toilets are not washed until they make the round-trip from Hot Springs to Memphis. I did not notice if the five or six men used the toilet or not (R. 185). I think there were two colored ladies sitting in the compartment with the congressman. As I walked through the train I opened the doors each time between the smoking ends and the middle compartment where the congressman was riding (R. 185-186). This was done every time the train stopped.

A. C. McGuire, for the defense, testified (R. 189): I live in Little Rock, Arkansas, and was employed in April, 1937, by the Rock Island Railway Company, as mechanical foreman at Memphis, Tennessee.

I do not do any of the cleaning of the cars myself (R. 194). The observation car on Train 45 of the Rock Island,

in April, 1937, had different kinds of carpet and washbowls than the Jim Crow car (R. 196). There were linen towels in the observation car, but only paper towels in the Jim Crow car (R. 197). There were different cuspidors than in the Jim Crow car (R. 198). In the observation car the chairs and seats are upholstered (R. 213). They have smoking stands, writing desks, a radio. The Jim Crow car has leather seats, while the observation car has plush seats and the observation car is intended to be more comfortable than the Jim Crow car (R. 200).

ARTHUR W. MITCHELL, complainant, testified (R. 202): I complained to Conductor Jones when I was being ejected from the first-class accommodations by him. I told him I was first-class passenger and entitled to first-class accommodations. He stated, *"There are no first-class accommodations for colored people on this train."*

BLANK PAGE

BLANK PAGE

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

REPLY BRIEF FOR ARTHUR W. MITCHELL, APPELLANT.

RICHARD E. WESTBROOKS,
Chicago, Illinois

and

ARTHUR W. MITCHELL, *Pro Se,*
Chicago, Illinois
Attorneys for Appellant.

March 10, 1941.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
I. Reason for filing reply brief	1
II. The United States concedes correctness of two major contentions urged by the appellant for reversal	2
III. The charge that the appellant has shifted his position since the trial before the Commissioner's Examiner is not supported by the record	3
Conclusion	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

REPLY BRIEF FOR ARTHUR W. MITCHELL, APPELLANT.

I.

Reasons for filing reply brief.

We have carefully considered the joint brief filed by the appellees, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, Illinois Central Railroad Company and the Pullman Company, and the carbon copy of the brief received by the appellant March 7 and 10, 1941, for the appellee, Interstate Commerce Commis-

sion and find that both briefs raise a host of minor controversies over mere details but we have been unable to find ~~in either~~, answers to the propositions of law tendered by the brief for appellant. These details we shall not attempt to meet, lest a particularized rebuttal by the appellant, obscure the essential simplicity of the issues presented to this court for decision. We expressly desire to note that we do not concede that appellees are correct on the issues which are not developed in reply. Instead, we shall briefly call to the attention of this Honorable Court two matters which we believe sufficient to close the pleadings.

II.

The United States concedes correctness of two major contentions urged by the appellant for reversal.

The Solicitor General, representing the appellee, United States, concedes the following two major contentions urged by the appellant for reversal of the decree of the district court to-wit:

1. That the Arkansas Separate Coach Law does not apply to an interstate passenger.
2. That the volume of traffic does not justify discrimination against American citizens traveling in interstate commerce as first-class passengers, because of their race.

Reference is hereby made to the Memorandum for the United States filed by the Solicitor General, in support of the above contentions urged by the appellant for the reversal of the decree of the district court and the appellant joins the Solicitor General in his recommendation that the decree of the district court be reversed, the Commission directed to reinstate the appellant's complaint and to proceed in the light of the opinion of this court.

III.

The charge that the appellant has shifted his position since the trial before the Commissioner's examiner is not supported by the record.

The appellees, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, Illinois Central Railroad Company and the Pullman Company in their joint brief (p. 3, para. 3, 4; p. 4, para. 1) charge that the appellant has shifted his position concerning the question of the acceptance by the appellant of the segregation under the Arkansas Statute and other questions appearing in appellant's briefs filed in this court. It is only necessary to call to the attention of this court the allegations contained in the complaint filed before the Commission (R. 2-7); the testimony of the witnesses (R. 70-201) including the witnesses for the appellees; Defendants' Exhibit Number 2—Exceptions on behalf of plaintiff, Arthur W. Mitchell to report proposed by William S. Disque, Examiner (R. 260-264); the Argument in Support of the Exceptions (R. 264-279) and the Brief filed by the appellant in this court, all of which we submit clearly demonstrates the incorrectness of the charge against the appellant by the appellees, that the appellant has shifted his position. We believe further reference is unnecessary to meet the charge.

CONCLUSION.

For these reasons, in addition to those set out in our main brief, it is respectfully submitted that the decision of the court below should be reversed.

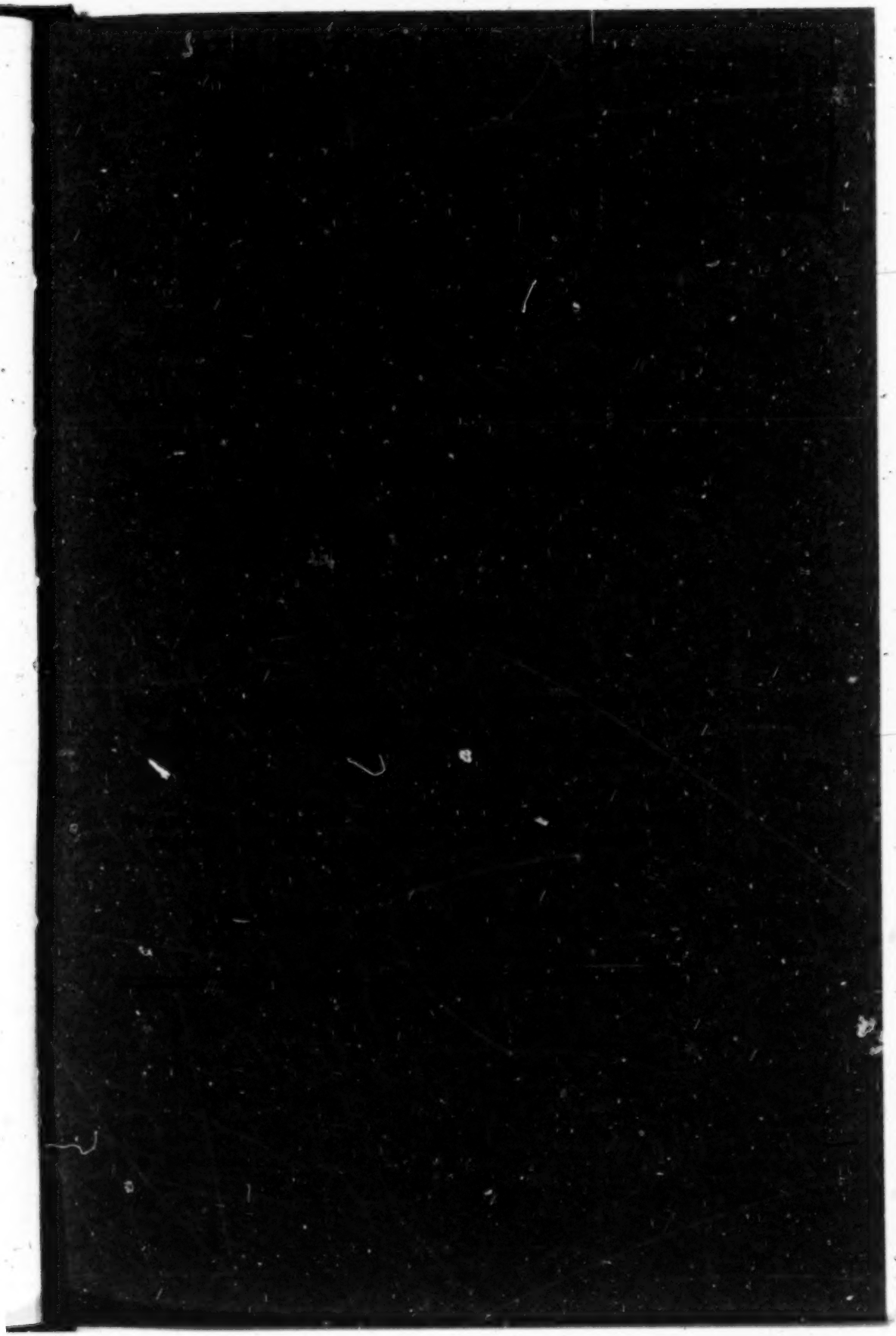
Respectfully submitted,

RICHARD E. WESTBROOKS,
and
ARTHUR W. MITCHELL, *Pro Se,*
Attorneys for Appellant.

March 10, 1941.

BLANK PAGE

BLANK PAGE



BLANK PAGE

INDEX

	Page
Statement	2
I. Appellant's standing to sue	4
II. The lawfulness of the discrimination	6
A. The Arkansas statute	7
1. The segregation	7
2. Interstate passage: construction	7
3. Interstate passage: constitutionality	10
B. The carrier's practice	12
C. Equality of accommodations	15
1. The rule	15
2. The equality of accommodation	16
3. The small number of colored passengers	17
D. The effect of the Commission's determination	19
Conclusion	20

CITATIONS

Cases:

Abbott v. *Hicks*, 44 La. Ann. 770	9
Alabama & V. R. Co. v. *Morris*, 103 Miss. 511, 60 So. 11, writ of error dismissed on motion of plaintiff in error, 234 U. S. 766	9
Arkansas Gas Co. v. *Department*, 304 U. S. 61	11
Armour & Co. v. *The Alton Railroad Co.*, No. 293, this Term	5
Berea College v. *Kentucky*, 211 U. S. 45	7
Butts v. *Merchants Transportation Co.*, 230 U. S. 126	13
Carrey v. *Spencer*, 36 N. Y. Supp. 886	9
Case v. *Los Angeles Lumber Co.*, 308 U. S. 106	8
Chesapeake and Ohio Ry. Co. v. *Kentucky*, 179 U. S. 388	9, 10
Chicago Junction Case, The, 264 U. S. 258	4
Chiles v. *Chesapeake and Ohio Railway*, 125 Ky. 299, affirmed, 218 U. S. 71	9, 10, 12, 14, 15
Civil Rights Cases, 109 U. S. 3	13
Coger v. *Northwest. Union Packet Co.*, 37 Iowa 145	15
Councill v. *The Western & Atlantic R. R. Co.*, 1 I. C. C. 339	14
Cozart v. *Southern Ry. Co.*, 16 I. C. C. 226	14
Crosby v. *St. L.-S. F. Ry. Co.*, 112 I. C. C. 239	14
Cumming v. *Board of Education*, 175 U. S. 528	7
Edwards v. *Nash., Chat. & St. Louis Ry. Co.*, 12 I. C. C. 247	14

297492—41——1

Cases—Continued Page

El Paso & Northeastern Railway Co. v. *Gutierrez*, 215 U. S. 87 ... 13
Gaines v. *Seaboard Air Line Ry.*, 16 I. C. C. 471 ... 14
General Inv. Co. v. *N. Y. Central R. R.*, 271 U. S. 228 ... 3
Gong Lum v. *Rice*, 275 U. S. 78 ... 7
Gwin, etc., Inc. v. *Henneford*, 305 U. S. 434 ... 10
Hall v. *De Cuir*, 95 U. S. 485 ... 10
Heard v. *The Georgia R. R. Co.*, 1 I. C. C. 428 ... 14
Heard v. *The Georgia Railroad Co.*, 3 I. C. C. 111 ... 14
Heiner v. *Donnan*, 285 U. S. 312 ... 18
Hart v. *State*, 100 Md. 595, 60 Atl. 457 ... 9, 15
Houck v. *Southern Pac. Ry. Co.*, 38 Fed. 226 ... 15
Huff v. *Norfolk & Southern R. Co.* 88 S. E. 344 ... 9
Interstate Commerce Commission v. *Oregon-Washington R. Co.*, 288 U. S. 14 ... 2
Inland Waterways Corp. v. *Young*, 309 U. S. 517 ... 14
Keck v. *United States*, 172 U. S. 434 ... 8
Keifer & Keifer v. *R. F. C.*, 306 U. S. 381 ... 12
Louisville & N. R. Co. v. *United States*, 282 U. S. 740 ... 19
Louisville &c. Railway Co. v. *Mississippi*, 133 U. S. 587 ... 8, 10
Maurer v. *Hamilton*, 309 U. S. 598 ... 11
McCabe v. *Atchison, T. & S. F. Ry. Co.*, 186 Fed. 966; affirmed, 235 U. S. 151 ... 6, 7, 9, 10, 15, 18, 20
Milk Board v. *Eisenberg Co.*, 306 U. S. 346 ... 11
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282 ... 20
Missouri ex rel. Gaines v. *Canada*, 305 U. S. 337 ... 7, 18, 20
Mobile & O. R. R. Co. v. *Spenny*, 12 Ala. App. 375 ... 15
Moffat Tunnel League v. *United States*, 289 U. S. 113 ... 4
Morrisdale Coal Co. v. *Penna. R. R. Co.*, 230 U. S. 304 ... 5
Murphy v. *Western & A. R. R.*, 23 Fed. 637 ... 15
Nashville, C. & St. L. Ry. v. *Browning*, 310 U. S. 362 ... 19
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294 ... 14
Ohio Valley Ry.'s Receiver v. *Lander*, 20 Ky. L. Rep. 913 ... 15
Pace v. *Alabama*, 106 U. S. 583 ... 7
Pennsylvania Co. v. *United States*, 236 U. S. 351 ... 20
Pittsburgh & W. Va. Ry. v. *United States*, 281 U. S. 479 ... 4
Plessy, Ex parte, 45 La. Ann. 80, affirmed, 163 U. S. 537 ... 15
Plessy v. *Ferguson*, 163 U. S. 537 ... 7, 9, 10, 12
Robinson v. *Baltimore & O. R. R.*, 222 U. S. 506 ... 5
Rochester Telephone Corp. v. *United States*, 307 U. S. 125 ... 4, 19
Shreveport Cases, The, 234 U. S. 342 ... 19
Smith v. *State*, 100 Tenn. 494, 46 S. W. 566; writ of error dismissed on motion, 21 S. Ct. Rep. 917, 45 L. Ed. 1256 ... 9
South Carolina Highway Department v. *Barnwell Bros.*, 303 U. S. 177 ... 11
South Covington &c. Ry. Co. v. *Kentucky*, 181 Ky. 449, affirmed, 252 U. S. 399 ... 9, 10

Cases—Continued	Page
So. Kansas Ry. v. *State*, 99 S. W. 166	9
Southern Ry. Co. v. *Norton*, 112 Miss. 302, 73 So. 1	9
State Tax Commission v. *Van Cott*, 306 U. S. 511	10
Tank Car Corp. v. *Terminal Co.*, 308 U. S. 422	5
Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426	5
United States v. *American Trucking Ass'ns*, 310 U. S. 534	14
United States v. *Hutcheson*, No. 43, this Term	12
Warehouse Co. v. *United States*, 283 U. S. 501	19
Washington, B. & A. Electric R. Co. v. *Waller*, 289 Fed. 598	9, 14
Welch Co. v. *New Hampshire*, 306 U. S. 79	11
Youngstown Sheet & Tube Co. v. *United States*, 295 U. S. 476	4
Statutes:	
Civil Rights Act of 1871, c. 114, 18 Stat. 335, Secs. 1, 2	13
Interstate Commerce Act, c. 104, 24 Stat. 379, 380, Sec. 3 (1) (49 U. S. C. § 3)	12, 15, 18
Commerce Court Act, c. 309, 36 Stat. 539	2
Act of October 22, 1913, c. 32, 38 Stat. 208 (28 U. S. C. §45a)	2
Arkansas separate coach law (Acts of 1891, pt. 15, as amended by Acts of 1893, p. 200; Pope's Digest, 1937, Vol. I) Secs. 1190–1199	6, 7, 12
Miscellaneous:	
H. R. 8821, 75th Cong., 3d Sess.	14
H. R. 182, 76th Cong., 1st Sess.	14
H. R. 112, 77th Cong., 1st Sess.	14

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 577

ARTHUR W. MITCHELL, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES

The United States, one of the five appellees in this case,[1] does not support the judgment of the court below. The legal questions, however, are not entirely clear and the Solicitor General is of the opinion that both this Court and the other appellees are entitled to have presented the arguments which may be advanced in support of the judgment below.

[1] The other appellees are the Interstate Commerce Commission, the trustees of the Chicago, Rock Island and Pacific Railway Company, the Illinois Central Railway Company, and the Pullman Company.

He has, therefore, authorized the Interstate Commerce Commission to file a brief and appear in argument in support of the order of the Commission and the judgment below.[2]

The following memorandum outlines the reasons which have led the United States to the conclusion that the judgment of the court below should be reversed.

STATEMENT

Appellant filed a complaint (R. 3–7) with the Interstate Commerce Commission, charging that the appellee carriers had subjected him to undue and unreasonable prejudice, and praying that they be required in the future to cease and desist from violations of the Interstate Commerce Act and to provide for colored persons holding tickets for first-class accommodations from Chicago, Illinois, to Hot Springs, Arkansas, such first-class facilities as the Commission may deem reasonable and just (R. 6, 7).

The Commission found that the case was "built mainly on an unpleasant experience complainant had about 18 months ago" (R. 21). On the morning of April 21, 1937, the appellant, en route from Chicago to Hot Springs, was compelled under threat of arrest to move from a Pullman car after

[2] Under Section 5 of the Commerce Court Act (36 Stat. 539; see 38 Stat. 208; 28 U. S. C. § 45a) the Commission may appear independently of the United States. See *I. C. C.* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 22–27.

the train crossed the Arkansas border. This was in purported compliance with an Arkansas segregation statute. He held a first-class railroad ticket and offered to pay for his Pullman seat. The appellee carriers, under ordinary circumstances, would have made a Pullman drawing room available, but all were then occupied by white passengers. Appellant accordingly was transferred into a second-class coach reserved for the use of colored passengers.[3] The conductor advised appellant that he could obtain a refund of the extra cost of the first-class ticket, but this has never been claimed by the appellant (R. 21–22).

The Commission on November 7, 1938, dismissed appellant's complaint (R. 34). Four members dissented (R. 30–33), and a fifth dissented in part. Appellant brought suit to set aside this order (R. 1–40). The three-judge district court upon general findings of fact and conclusions of law (R. 52–53) dismissed the cause for lack of jurisdiction[4] (R. 53). Appellant was allowed an appeal (R. 61–62) and this Court noted probable jurisdiction on December 16, 1940.

---

[3] There was testimony that this coach was filthy and far inferior to the second-class coach reserved for the use of white persons, but at the time of the hearing a new coach of quality equal to those used by second-class white passengers was in use (R. 22–24).

[4] In the light of the findings, we are of opinion that the dismissal is more accurately described as placed on the merits rather than want of jurisdiction. See *General Inv. Co.* v. *New York Central R. R.*, 271 U. S. 228, 230.

I

Appellant's Standing To Sue

At the threshold of the case lies a question as to appellant's standing to attack the Commission's refusal to issue a cease-and-desist order. It is immaterial that the order dismissing his complaint was negative in form. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125. But neither the complaint nor the findings show that appellant intends in the future to use the appellee carriers between Chicago and Hot Springs, and his complaint is limited to the discrimination to which he was subjected on this run by these carriers.

Standing to attack an order of the Interstate Commerce Commission is probably not an automatic consequence of appearance before the Commission. See *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479, 486; compare *The Chicago Junction Case,* 264 U. S. 258, 268. Some independent interest in the order is doubtless necessary. *Moffat Tunnel League* v. *United States,* 289 U. S. 113; cf. *Youngstown Sheet & Tube Co.* v. *United States,* 295 U. S. 476, 479.

However, appellant is probably able to show a pecuniary interest in his attack on the Commission's order. He has brought an action at law for damages against the appellee carriers (R. 21–22). The Interstate Commerce Commission has primary jurisdiction to determine the lawfulness of an

alleged discrimination, and a suit for damages cannot be maintained until the Commission has determined that the discrimination is unlawful. *Robinson* v. *Baltimore & O. R. R.*, 222 U. S. 506; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304; *Armour & Co.* v. *The Alton Railroad Co.*, No. 293, this Term; cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 433. Accordingly, if the success of appellant's action at law turns on the action of the Commission,[5] he has a pecuniary interest sufficient to attack the order.

More fundamentally, we think that vindication of the rights of the person ranks higher than protection of one's right not to be charged discriminatory rates. While appellant has not shown any specific intention of again using the appellee carriers between Chicago and Hot Springs, few men can so order their personal affairs that their future travels are predictable. Petitioner has already

[5] We suggest below (pp. 19–20) that no question of administrative judgment can properly be found in this case. The "primary jurisdiction" doctrine is based upon the fact that the ordinary case of discrimination involves questions of administrative judgment. If the procedural rule were limited to its reasons, we should accordingly conclude that the court had jurisdiction in this case without regard to the Commission's action. But in matters of procedure, it is sufficient that the reason for the rule applies in *most* cases. If a determination on the merits were to shape the antecedent procedure, there would be an unnecessary sacrifice of procedural simplicity and expedition.

been subjected to one indignity because of his race and, if the discrimination be unlawful, is entitled to guard against its recurrence. See *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151, 163–164. The guaranties of equal treatment cover the occasional traveler as well as the commuter.

II

The Lawfulness of the Discrimination

The majority of the Commission ruled: (1) the appellee carriers were justified in assuming that the Arkansas Separate Coach Law applied to an interstate transportation (R. 28); (2) the carrier practice of segregation would be valid in the absence of the state statute (R. 28); and (3) the small amount of colored traffic, rarely in excess of the available Pullman drawing rooms, made the occasional discrimination when separate Pullman accommodations were not available neither unjust nor undue (R. 29–30).[6]

---

[6] Commissioner Eastman dissented, with reluctance because of the practical burdens placed upon the carriers if they were required to provide equal accommodations (R. 30–31). Commissioners Lee, Aitchison, and Porter dissented on the ground that the Interstate Commerce Act required equality of accommodations (R. 31–33). Commissioner Miller dissented in part, on the ground that the Commission should find discrimination against the appellant on this trip, even though ordinarily there would be none, when drawing rooms were available (R. 33).

A. THE ARKANSAS STATUTE

1. *The Segregation.*—This Court on several occasions has ruled that segregation statutes do not violate the Fourteenth Amendment.[7] *Plessy* v. *Ferguson,* 163 U. S. 537; *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151, 160; cf. *Cumming* v. *Board of Education,* 175 U. S. 528, 544–545; *Berea College* v. *Kentucky,* 211 U. S. 45; *Gong Lum* v. *Rice,* 275 U. S. 78, 85–86; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 344. We shall, therefore, assume that the Arkansas statute does not deny equal protection because of its command that colored and white passengers be segregated.

2. *Interstate Passage: Construction.*—The Arkansas Separate Coach Law[8] (Acts of 1891, p. 15, as amended by Acts of 1893, p. 200; Pope's Digest, 1937, Vol. I, Sec. 1190) provides:

---

[7] See, also, the numerous decisions of the lower federal courts and the state courts cited in the *Gong Lum* (275 U. S. at 86) and the *Plessy* (163 U. S. at 548) cases, and the decisions upholding state segregation statutes against attack under the commerce clause (*infra*, pp. 8–10). Compare *Pace* v. *Alabama,* 106 U. S. 583.

[8] The entire Act is printed in the Appendix to appellant's brief, pp. 15–17.

Other sections forbid persons, on penalty of a $10–$200 fine, to occupy seats assigned to those of another race (Secs. 1192, 1196); forbid carriers to permit the joint use of sleeping or chair cars (Sec. 1193); require train officers to separate the races, on penalty of a $25 fine (Secs. 1195, 1196); authorize train officers to refuse to carry any passenger who refuses to occupy the assigned coach (Sec. 1197); impose a fine of $100–$500 upon a railway company for every day and every train run in violation of the Act (Sec. 1198); and require that the statute be posted in every coach (Sec. 1199).

> All railway companies carrying passengers in this state shall provide equal but separate and sufficient accommodations for the white and African races by providing two or more passenger coaches for each passenger train; * * *.

The Arkansas courts have not considered whether or not the statute applies to interstate transportation. The statutory language, "All railway companies carrying passengers in this state", is equivocal. We believe, however, that the statute should be construed to apply only to the intrastate transportation of passengers.

In *Louisville &c. Railway Co.* v. *Mississippi*, 133 U. S. 587, 592, this Court sustained a segregation statute phrased in almost identical terms[*] on the ground that the state court had construed it to apply only to intrastate transportation. That case was decided March 3, 1890, one year before enactment of the Arkansas statute. On familiar principles, the Arkansas legislature must be presumed to have adopted this construction. *Keck* v. *United States*, 172 U. S. 434, 436; *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115.

This Court has similarly approved the state court construction of other state segregation statutes, correspondingly equivocal, as applicable only to

[*] The statute there involved required "all railroads carrying passengers in this State (other than street railroads)" to provide separate but equal accommodations (133 U. S. at 588).

intrastate passage. *Plessy* v. *Ferguson,* 163 U. S. 537, 548; *Chesapeake and Ohio Ry. Co.* v. *Kentucky,* 179 U. S. 388, 394. And in *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151, 160, this Court in dictum said that there was "no reason to doubt" that an Oklahoma segregation statute, "in the absence of a different construction by the state court, must be construed as applying to transportation exclusively intrastate". The weight of authority in the state courts is to the same effect. While two state courts have held that segregation statutes cast in general terms apply to interstate as well as intrastate transportation,[10] the courts of six states have limited these statutes to transportation of passengers wholly within the state.[11] These decisions, it is true, do not represent an independent ruling on statutory construction; ordinarily the opinion proceeds under the compulsion of an assumed constitutional prohibition.

---

[10] *Smith* v. *State,* 100 Tenn. 494, 46 S. W. 566, writ of error dismissed on motion, 21 S. Ct. Rep. 917, 45 L. Ed. 1256; *Southern Ry. Co.* v. *Norton,* 112 Miss. 302, 73 So. 1; *Alabama & V. R. Co.* v. *Morris,* 103 Miss. 511, 60 So. 11, writ of error dismissed on motion of plaintiff in error, 234 U. S. 766.

[11] *Hart* v. *State,* 100 Md. 595, 60 Atl. 457; *Chiles* v. *Chesapeake and Ohio Ry. Co.,* 125 Ky. 299, affirmed, 218 U. S. 71; *So. Covington &c. Ry. Co.* v. *Kentucky,* 181 Ky. 449, affirmed, 252 U. S. 399; *Abbott* v. *Hicks,* 44 La. Ann. 770; *So. Kansas Ry.* v. *State,* 99 S. W. 166 (Tex. Civ. App.); *Carrey* v. *Spencer,* 36 N. Y. Supp. 886; see, also, *Washington, B. & A. Electric R. Co.* v. *Waller,* 289 Fed. 598 (App. D. C.); *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 186 Fed. 966 (C. C. A. 8th), affirmed, 235 U. S. 151; cf. *Huff* v. *Norfolk & Southern R. Co.,* 88 S. E. 344.

Compare *State Tax Commission* v. *Van Cott,* 306 U. S. 511. But, even if the assumption were unwarranted, the consistent rulings may be supposed to have represented also the expectations of the Arkansas legislature. See *Gwin, etc., Inc.* v. *Henneford,* 305 U. S. 434, 441.

3. *Interstate Passage: Constitutionality.*—If, however, the Arkansas statute were construed as applicable to interstate transportation, it might well then be unconstitutional as a forbidden regulation of interstate commerce.

This Court has never directly ruled upon the question. But in *Hall* v. *De Cuir,* 95 U. S. 485, it held invalid, as a regulation of interstate commerce, a Louisiana statute (of 1869) which forbade common carriers to discriminate on account of race or color. The confusion which would arise from separate and varying state laws was considered conclusive that the subject was for national regulation alone. On the authority of the *De Cuir* case, this Court in dicta has frequently stated or assumed that a state segregation statute could not constitutionally be applied to an interstate passage. *Louisville &c. Railway Co.* v. *Mississippi,* 133 U. S. 587, 590, 591; *Plessy* v. *Ferguson,* 163 U. S. 537, 548; *Chesapeake and Ohio Ry. Co.* v. *Kentucky,* 179 U. S. 388, 394; *Chiles* v. *Chesapeake and Ohio Railway,* 218 U. S. 71, 75; *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151, 160; *South Covington &c. Ry. Co.* v. *Kentucky,* 252 U. S. 399,

403–404, see 407. The lower federal courts and most of the state courts have similarly held that the commerce clause protects the interstate passenger from a state segregation statute. Two state courts, have, however, ruled to the contrary.[12]

The statute, it is true, may be argued to be an exercise of the power of Arkansas to provide for the comfort of those within its borders. If there were an important occasion for the exercise of the so-called police power of Arkansas, the recent decisions of this Court demonstrate that the interstate carrier would not be exempt. *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177; *Arkansas Gas Co.* v. *Department*, 304 U. S. 61; *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346; *Clason* v. *Indiana*, 306 U. S. 439; *Maurer* v. *Hamilton*, 309 U. S. 598.

But the distribution of commerce powers between state and nation cannot proceed upon mathematical formulae. The task of this Court under the Constitution is one of adjustment and reconciliation. In performance of this task it cannot, of course, ignore other provisions of the Constitution. The Thirteenth, Fourteenth, and Fifteenth Amendments set up a constitutional policy against racial discrimination. Those amendments

[12] The cases are listed *supra*, p. 9, notes 10 and 11; the decisions represent a blend of constitutional decision and statutory construction.

have been held not to contain any specific prohibition against racial segregation (*supra,* p. 7). But, while they fall short of the specific prohibition, they remain as a factor which must be weighed in the commerce clause adjustments. There is, in other words, no occasion to permit state power to reach into the field of interstate commerce in order to accomplish an end at variance with the basic policy of the Amendments. Compare *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, 391; *United States* v. *Hutcheson,* No. 43, this Term.

We conclude, therefore, that the Arkansas separate coach law is inapplicable to interstate passage, whether as a matter of statutory construction or of constitutional limitation.

B. THE CARRIER'S PRACTICE

In *Chiles* v. *Chesapeake and Ohio Railway,* 218 U. S. 71, this Court ruled that a carrier, without regard to the inter- or intra-state character of the journey, had power by regulation to segregate white and colored passengers. The opinion, analogizing the carrier's power to that of a state, rested upon *Plessy* v. *Ferguson,* 163 U. S. 537.

The Court, in the *Chiles* case did not consider Section 3 (1) of the Interstate Commerce Act, which forbids any carrier from subjecting "any particular person * * * or any particular description of traffic * * * to any undue or

unreasonable prejudice or disadvantage in any respect whatsoever."[13] It is by no means clear that the segregated colored passenger is not in *some* respect subjected to an undue or unreasonable prejudice or disadvantage simply because he is not denied "the equal protection of the laws." The prejudice is clear, and the only question is whether it is "undue" or "unreasonable." The answer to this question would be different according as one looked to the established customs of the region or to the basic concepts of our government, as reflected in the Thirteenth, Fourteenth, and Fifteenth Amendments.

However, the question is one of statutory construction. Whatever might be the correct view if the matter were open to original examination, the long-continued practice of the Interstate Commerce Commission has been to allow segregation by the carriers so long as equal accommodations were

[13] The opinion also ignores the Civil Rights Act of 1875 (18 Stat. 335), Sections 1 and 2 of which forbid public conveyances from refusing equal accommodations because of color. The Act, however, was held unconstitutional in the *Civil Rights Cases*, 109 U. S. 3, as applied within a state. In *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, the Court held that the Act was inseparable, and could not after its invalidation in the *Civil Rights Cases* be applied to interstate carriers by water. Compare, however, *El Paso & Northeastern Railway Co.* v. *Gutierrez*, 215 U. S. 87. We assume, therefore, that appellant is not aided by the Civil Rights Act.

separately provided.[14] This administrative practice, adopted contemporaneously with the Act, must on familiar principles be supposed to have received the approval of Congress.[15] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524–525; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549. We assume, therefore, that segregation by carrier regulation does not violate the Interstate Commerce Act.

However, it is not wholly clear in this case that there was a carrier regulation of dignity sufficient to come within the rule of *Chiles* v. *Chesapeake and Ohio Railway*, 218 U. S. 71. That case was read in *Washington, B. & A. Electric R. Co.* v. *Waller*, 289 Fed. 598, 601–603 (App. D. C.), to require a formal, published regulation, rather than merely a customary practice, to justify segregation of colored passengers. Under this limitation of the

---

[14] See *Councill* v. *The Western & Atlantic R. R. Co.*, 1 I. C. C. 339; *Heard* v. *The Georgia R. R. Co.*, 1 I. C. C. 428; *Heard* v. *The Georgia Railroad Co.*, 3 I. C. C. 111; *Edwards* v. *Nash., Chat. & St. Louis Ry. Co.*, 12 I. C. C. 247; *Cozart* v. *Southern Ry. Co.*, 16 I. C. C. 226; *Gaines* v. *Seaboard Air Line Ry.*, 16 I. C. C. 471; *Crosby* v. *St. L.-S. F. Ry. Co.*, 112 I. C. C. 239. In the four cases first cited discrimination in accommodations was found, in the three last cited it was not.

[15] This inference receives some added support in view of the bills to forbid segregation which have been introduced in Congress only to languish in Committee. See, e. g., H. R. 8821, 75th Cong., 3d Sess.; H. R. 182, 76th Cong., 1st Sess.; H. R. 112, 77th Cong., 1st Sess.

rule, which is not entirely justified by the opinion in the *Chiles* case, it is doubtful that the carrier's practice rose to the formality of a rule or regulation (see R. 24–25; 131, 140, 141, 147, 172, 178).

We have, therefore, some doubt whether any segregation would be warranted on the appellees' Chicago-Hot Springs run. But in view of the conclusions reached in the next section, we think it unnecessary to resolve this question.

C. EQUALITY OF ACCOMMODATIONS

1. *The Rule.*—In every decision of this Court dealing with segregation by carriers it has been assumed that, under the equal protection clause, the separate accommodations must be of equal quality. And in *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151, 161, this Court in considered dictum ruled that "substantial equality of treatment of persons traveling under like conditions cannot be refused." The state courts and the lower federal courts, without exception, have held likewise.[16] The Interstate Commerce Commission has invariably applied the same rule under Section 3 (1) of the Interstate Commerce Act (*supra*, p. 14).

[16] See, e. g., *Mobile & O. R. R. Co.* v. *Spenny*, 12 Ala. App. 375, 387; *Coger* v. *Northwest. Union Packet Co.*, 37 Iowa 145, 153, 156–157; *Ohio Valley Ry.'s Receiver* v. *Lander*, 20 Ky. L. Rep. 913, 917; *Ex parte Plessy*, 45 La. Ann. 80, 84–85, affirmed, 163 U. S. 537; *H[illegible]* v. *State*, 100 Md. 595, 601; *Murphy* v. *Western & A. R. R.*, 23 Fed. 637, 639 (C. C. E. D. Tenn.); *Houck* v. *Southern Pac. Ry. Co.*, 38 Fed. 226, 228 (C. C. W. D. Tex.)

The Arkansas statute itself requires that the accommodations be equal (*supra*, p. 8).

2. *The Equality of Accommodation.*—The actual incident which precipitated the appellant's complaint involved a discrimination because of his color even as compared to second-class white travelers (R. 22–23). But since July 1937 the carrier has put in service a coach for colored passengers which is of equal quality with that used by second-class white passengers (R. 23). Since the complaint asks only relief for the future, it may be assumed that colored passengers who travel second-class have accommodations equal to those open to white passengers at the same fare.

However, the question does not end with travel on second-class tickets. Colored passengers who travel first-class on the appellee carriers are not, we believe, given accommodations which are substantially equal to those open to white passengers. When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger.[17] But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become

[17] Discrimination remains, for an enforced privacy may well be galling and unwelcome. But, in view of the decisions sustaining segregation statutes as applied to interstate commerce (*supra*, p. 7) and segregation regulations of the carriers (*supra*, pp. 12–14), we assume this discrimination to be without legal significance.

self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations.[18] So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.[19]

3. *The Small Number of Colored Passengers.*— The Commission accepted the testimony of the railroad conductor that only 10 or 12 times in the past 32 years on the Memphis-Hot Springs run had colored passengers been forced to leave the Pullman for want of separate accommodations; it observed, however, that "what demand there may have been at ticket offices does not appear" (R. 24). The Commission recognized that a discrimination occurred on the specific trip which underlay this proceeding, but ruled that it was not unjust or undue because of the "comparatively little colored traffic" (R. 26–27, 29–30).

This ruling we believe to be erroneous. The Constitution[20] and the Interstate Commerce Act alike

---

[18] Commissioner Miller suggested this expedient in his partial dissent (R. 33).

[19] Indeed, even with respect to the colored passenger who secures a drawing room, the Commission found that "there are no dining-car nor observation-parlor car accommodations for the latter and they can not lawfully range through the train" (R. 24).

[20] The equal protection clause of the Fourteenth Amendment would reach to the Arkansas statute; the due-process

make the guaranty of equal treatment one which is personal to each passenger. The majority of the Commission considered that it was dealing with a question of "colored traffic" (R. 29). It was, however, faced instead with an issue of the basic liberties and privileges of citizens. These are secured to each person, not only to those members of groups sufficiently numerous to make the liberty or privilege expedient, or attainable without undue expense or inconvenience.

This Court, in emphatic dictum, so held in *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151, 161–162. In *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351, the Court made a corresponding decision with respect to state educational facilities. It is true that both cases dealt with the effect of the equal protection clause upon state statutes, while here the case deals with a state statute combined with a carrier regulation challenged under the Interstate Commerce Act. But, even assuming the state statute can be ignored and the issue treated as one of a carrier regulation alone, we do not believe that a practice which, if commanded by a state, would be a denial of equal protection of the laws, can escape condemnation under Section 3 (1) as an "undue or unreasonable prejudice or disadvantage in any respect whatsoever." This language, the Court has frequently observed, "is certainly sweeping enough to

---

clause of the Fifth Amendment to the action of the Commission (cf. *Heiner* v. *Donnan*, 285 U. S. 312, 326, 338).

embrace all the discriminations of the sort described which it was within the power of Congress to condemn." *The Shreveport Case*, 234 U. S. 342, 356; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 749–750; *Warehouse Co.* v. *United States*, 283 U. S. 501, 512–513.

D. THE EFFECT OF THE COMMISSION'S DETERMINATION

The majority of the Commission, in the last analysis, seems to have directed dismissal of the appellant's complaint because of its finding (R. 29)—

> that the present colored-passenger coach and the Pullman drawing rooms meet the requirements of the act; and that as there is comparatively little colored traffic and no indication that there is likely to be such demand for dining-car and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, * * *.

Commissioner Eastman, dissenting, recognized the practical difficulties which would follow upon requiring that the discrimination be eliminated, and suggested possible solutions (R. 30–31).

If the issue before this Court called into question the Commission's judgment on these practical or economic obstacles to a removal of the inequality, its decision would not be open to review except upon a charge that it was arbitrary or without support in the evidence. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 366; *Rochester Telephone*

Corp. v. *United States,* 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287. This is the case in the ordinary discrimination complaint. *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361.

But we do not so conceive the issue here. We think there is no room for administrative or expert judgment as to the practical difficulties in removing the discrimination. However great these may be, the common carrier which undertakes to segregate its colored passengers must pay the cost. *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.

CONCLUSION

We therefore conclude that the Commission erroneously supposed that the Arkansas Separate Coach Law applied to an interstate passenger, and erroneously determined that the small number of colored passengers asking for first-class accommodations justified an occasional discrimination against them because of their race. If either of these conclusions is correct, the Commission should be directed to reinstate the appellant's complaint and to proceed in the light of the opinion of this Court.

FRANCIS BIDDLE,
Solicitor General.
WARNER W. GARDNER,
FRANK COLEMAN,
Special Assistants to the Attorney General.

MARCH 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

BLANK PAGE

FILE COPY

Supreme Court, U. S.
FILED
MAR 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL, Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, *et al.*, Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEES

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company.

Illinois Central Railroad Company.

The Pullman Company.

WALLACE T. HUGHES,
LOWELL M. GREENLAW,
VERNON W. FOSTER,
Attorneys for Appellees.

MARCUS L. BELL,
E. C. CRAIG,
C. S. WILLISTON,
ERWIN W. ROEMER,
Of Counsel.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

BLANK PAGE

SUBJECT INDEX.

	PAGE
PRELIMINARY STATEMENT	1
Findings of Fact	2
Conclusions of Law	2
Appellant's Specification of Errors	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
1. Appellant's acceptance of the constitutionality of the Arkansas separate-coach statute must be construed as eliminating the Fourteenth Amendment and Civil Rights Act from consideration	9
2. Whether the Arkansas statute does or does not lawfully apply to interstate passengers becomes important only if the Commission's decision depended solely upon that statute, to the exclusion of the Commission's own administrative judgment	12
3. Court decisions cited by appellant have not dealt, in any instance, with a case in which the Interstate Commerce Commission previously exercised its statutory authority to determine an issue raised under the Interstate Commerce Act	20
4. This Court has sustained laws of States enacted to meet local conditions, even though they incidentally affect interstate commerce, when congressional legislation has not occupied the field	27

PAGE

5. Appellant may not complain except in his own behalf, and he must establish his individual need of the remedy asked 33

6. Commission's report and order are supported by substantial evidence, and the finding of the lower court should be affirmed 37

TABLE OF CASES CITED.

Alabama & V. Ry. Co. v. Morris (1912) 103 Miss. 511, 60 So. 11 28

Armour & Company v. Alton R. R. Co., et al., ... U. S. 23

Arthur W. Mitchell v. Chicago, Rock Island & Pacific Railway Co., 229 I. C. C. 703 .....1, 10

Brown v. Memphis & C. R. Co., 7 Fed. 51, 63 6

Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453 29

Chiles v. Chesapeake & O. R. Co., 218 U. S. 71....18, 20, 24

Choctaw, O. & G. R. Co. v. State, 87 S. W. 426 25

Councill v. W. & A. R. Co., 1 I. C. Reports, 638, 641 (1887) 18, 22

Edwards v. N. C. & St. L. R. Co., 12 I. C. C. 247 19

Eichholz v. Public Service Commission of Missouri, et al., 306 U. S. 268 30

Emergency Freight Charges Within Idaho, 213 I. C. C. 130 17

Emergency Freight Charges Within Kansas, 211 I. C. C. 225 17

Emergency Freight Charges Within Montana, 214 I. C. C. 537 17

Emergency Freight Charges Within Oklahoma, 211 I. C. C. 23 17

PAGE

Evans v. Chesapeake & Ohio Ry. Co., 92 I. C. C. 713 19

Ex Parte Virginia, 100 U. S. 339 11

Gaines v. Seaboard Airline Railway, et al., 16 I. C. C. 471 ..... 19, 40

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422 23

Hall v. De Cuir, 95 U. S. 485 (1877) 21

Hart v. State, 60 Atl. 457 (1905) 28

Heard v. Georgia Railway Co., 1 I. C. Reports, 719.... 19

Henneford v. Silas Mason Company, 300 U. S. 577.... 31

Houston E. & W. T. Ry. Co. v. United States, 234 U. S. 342, 359 ..... 15, 16, 22

Illinois Central R. R. v. Interstate Commerce Commission, 206 U. S. 441, 454 46

Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 170 13

Louisville N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 590 23

Manufacturers Railway Co. v. United States, 246 U. S. 457 43

Maurer, et al. v. Hamilton, et al., 309 U. S. 598 30

McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151 (1914) 23, 35

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 31

Minnesota Rate Case, 230 U. S. 352 ..... 16, 22

Nelson v. Sears Roebuck & Co., ... U. S. 31

Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184, 196 13

Pennsylvania R. Co. v. United States, 236 U. S. 351, 361 13

PAGE

Phillips v. United States, ... U. S. ....., 61 S. Ct. 480 5

Plessy v. Ferguson, 163 U. S. 537, 546 .....11, 20

Railroad Commission of Louisiana v. St. L. S. W. Ry. Co., 23 I. C. C. 31 15

Railway Company v. Illinois, 118 U. S. 557 30

Rates on Raw Dolomite and Fluxing Stone Within State of Ohio, 188 I. C. C. 495 17

Rochester Telephone Corporation v. United States, et al., 307 U. S. 125, 146.....6, 7, 14, 42

Smith v. State (1898) 100 Tenn. 494, 46 S. W. 566 29

South Carolina Highway Department v. Barnwell Bros., 303 U. S. 161 30

Southern Pacific Co. v. Gallagher, 306 U. S. 167 31

Southern Ry. Co. v. Norton (1916) 112 Miss. 302, 73 So. 1 29

Southern Ry. Co. v. Primrose (1916) 73 So. 2 29

State of Missouri ex rel. Lloyd Gaines v. Canada, 305 U. S. 337 26

St. L. I. M. & S. R. Co. v. Arkansas, 240 U. S. 518 30

Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 435 4

Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219 13

United States, et al. v. Chicago Heights Trucking Company, et al., 310 U. S. 344, 352 .....6, 14, 44

United States v. Louisville & Nashville R. Co., 235 U. S. 314, 320 6

United States v. Louisville & N. R. Co., 235 U. S. 314, 320 13

U. S. v. Lowden, et al., 308 U. S. 225, 237, 239 32

Western Trunk Line Class Rates, 197 I. C. C. 57 17

Yick Wo v. Hopkins, 118 U. S. 356, 373 11

CONSTITUTIONS, STATUTES AND TEXTBOOKS.

PAGE

Constitution of the United States
Fourteenth Amendment 9

U. S. Statutes
Interstate Commerce Act (49 U. S. C.)
Section 3(1) 12
Section 15(1) 12
Judicial Code (28 U. S. C. 308) 2

State Statutes
Separate-Coach Law of Arkansas
(Pope's Digest, Chap. 20, Secs. 1190-1201) 9, 12
(This statute is printed in Appendix to Appellant's Brief, p. 15, and R. 211.) .....

Authorities Cited
23 Corpus Juris, 102, Sec. 1902 32
4 Corpus Juris Secundum, 465, Sec. 241 4
H. R. 8821 (1938) 32
H. R. 182 (1939) 32
H. R. 112 (1941) 33

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL, Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, *et al.*, Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEES

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company.

Illinois Central Railroad Company.

The Pullman Company.

PRELIMINARY STATEMENT.

The case before the Interstate Commerce Commission is reported in 229 I. C. C. 703, *Arthur W. Mitchell* v. *Chicago, Rock Island & Pacific Railway Co., et al.* The parties to this brief (appellees here) were defendants in

the proceeding before the Commission.[1] The Commission having dismissed his complaint, appellant brought an action before the United States District Court at Chicago and prayed that the court enter its decree that the order of the Commission be set aside, annulled and vacated (R. 40). The prayer further asked that "a decree be entered granting to the plaintiff the relief prayed for in his complaint filed before the said Commission." A special three-judge court was assembled to hear the case (Judicial Code, 28 U. S. C. ~~308~~ sec. 47), and after hearing all parties that court entered its separate findings of fact and conclusions of law and ordered that the cause be dismissed for lack of jurisdiction (R. 52, 53). The court's findings and conclusions are as follows:

Findings of Fact.

1. The order here in question was made by the Interstate Commerce Commission after a full hearing.

2. The Commission, after the hearing, found the facts specially, and stated separately its conclusions of law thereon, and they are made a part of these findings and conclusions respectively by reference.

3. The Commission's findings of fact were all supported by substantial evidence.

Conclusions of Law.

1. The findings of the Commission are not erroneous.

2. The order of the Commission is not contrary to law.

3. The order of the Commission contravenes no provision of the Federal Constitution.

4. The order of the Commission is supported by the findings.

---

[1] Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company and The Pullman Company.

5. This court is without jurisdiction to grant the relief sought in the complaint, or any part thereof, and the complaint should be dismissed.

An examination of the above findings and conclusions establishes that the court gave full consideration to the case on its merits.

Appellant has shifted his position since the trial before the Commission's Examiner. At that hearing, appellant Mitchell, addressing the Examiner, made this statement (R. 156): "The question of segregation is not involved." The case proceeded on that assumption. The examiner's report affirmatively found (R. 16) that "for the purpose of this proceeding complainant accepts segregation under the Arkansas statute." In exceptions to that report, as the Commission's opinion shows (R. 27), appellant expressed himself otherwise.[3] When the action to set aside the Commission's order of dismissal came to trial before the three-judge court, appellant Mitchell, as plaintiff and counsel, said to the court (R. 227): "There is no question of segregation involved. We have not said to the railroad that it must let us ride together with the white people. I care as little about riding with white people as they care about riding with me, * * *" In answer to a specific question of the court, "Are you invoking the Arkansas statute?", appellant said, "I asked the Commission to enforce that law but they refused to do so."

In his argument upon appeal to this court, appellant, so far as appellees can interpret his contentions, assumes a different position by maintaining that the statute of Arkansas, which requires the separation of races, does not apply to an interstate passenger.

---

[3] Impliedly the Commission must have taken notice of the statement quoted when it said in its report (p. 170, Rec. 28) that "the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic."

This shifting of positions is respectfully called to the attention of this court in the light of the established rule that a party may not, when a cause is brought up for appellate review, assume a theory inconsistent with or different from that taken by him at the trial.

Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 435, 4 Corpus Juris Secundum, 465, Section 241.

With that reservation, appellees will deal in this brief with the argument tendered by appellant's brief, which ignores the declaration of position on the question of segregation which was made both before the Commission and the court below by Appellant Mitchell himself.

Appellees respectfully remind the court that the complaint before the Commission involved only one passenger, and that one in but a single incident; that the only train in issue is the one operating from Chicago, Ill., to Hot Springs, Ark., over the Illinois Central and the Chicago, Rock Island and Pacific railroads, and that the colored compartment car in which, on April 21, 1937, Appellant Mitchell rode in Arkansas has not been in the train since July, 1937, when an entirely different type of car, fully described in the Commission's report (p. 707, Rec. 23), was placed in permanent service.

Appellant's Specification of Errors.

Beginning on page 15 of his brief, appellant specifies nine alleged errors in the final order and decree of the District Court dismissing his prayer for relief.

1. Assigned error No. 1 is treated comprehensively in these appellees' Argument contained in this brief, and it calls for no additional comment at this point. It is pertinent to observe, however, that by accepting, at least for the purposes of this case, the constitutionality of

the Arkansas statute, appellant's reference to the Fourteenth Amendment becomes irrelevant.

2. Assigned error No. 2 rests upon a false factual premise. The report of the Commission, as supported by the evidence, shows that appellees are not denying appellant equal accommodations and facilities, but are providing them in sufficient capacity to meet the normal demand of colored passengers. Appellant's charge that he was denied the equal protection of the laws in violation of the Constitution of the United States obviously refers to the Fourteenth Amendment, which applies only to States, and which Amendment has been removed from the case by appellant.

3. The comment in the preceding paragraph concerning assigned error No. 2 is equally pertinent to alleged errors Nos. 3, 4 and 5. It may be properly added, that these alleged errors are but a restatement in different phrasing of the allegations which were made by the appellant in his complaint before the Interstate Commerce Commission, and which the Commission considered in reaching its decision under the Act which it administers. It was not for the lower court to substitute its judgment for that of the Commission, which these assignments of error apparently contend that it should have done.

4. In assigned error No. 6, appellant confuses the law of contracts with the statutory functions of the Interstate Commerce Commission. This is not an action in assumpsit in a court of law, but a proceeding involving the administrative judgment of an agency of the Congress. Not being a court of law, the Commission is without jurisdiction to enforce a contract. Nor would the three-judge court below have jurisdiction to determine a contractual obligation, it being a special tribunal with narrow and limited functions. *Phillips* v. *United States*, ... U. S. ....., 61 S. Ct. 480, decided February 3, 1941.

No money damages in any amount whatsoever was sought from the Commission (R. 7). Defendants before the Commission have offered and stand ready to make refund to the complainant in the amount of the difference between 3 cents a mile and 2 cents a mile, which latter rate applied for coach travel (R. 21; Commission's report, p. 705). Apparently appellant intends to test his claim to money damages before a court and jury in the action he has brought in the Circuit Court of Cook County, Illinois (R. 90; Commission's report, p. 705). Presumably, it is in relation to alleged error No. 6 that appellant (p. 73 of his brief) devotes an argument to the proposition that "refund of money is not adequate redress for the wrongful exclusion by a common carrier of an American citizen engaged in an interstate journey as a first-class passenger." The case cited by him in support of the proposition (*Brown* v. *Memphis & C. R. Co.*, 7 Fed. 51, 63) grew out of a damage suit tried before a jury. The court's remarks had to do with a plea by the defendant in the case that the jury's verdict was excessive. The relevancy of the legal proposition and the citation to the question here is not apparent.

5. Appellant's assigned errors Nos. 7, 8 and 9 relate to the sufficiency of the evidence as a support of the Commission's findings. It is for the Commission and not a court to draw its inferences from the evidence, and so long as there is warrant in the record for the judgment of the expert body it must stand. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Rochester Telephone Corporation* v. *United States, et al.*, 307 U. S. 125, 146; *United States, et al.* v. *Chicago Heights Trucking Company, et al.*, 310 U. S. 344, 352.

SUMMARY OF ARGUMENT.

This complaint before the Interstate Commerce Commission does not differ in its essentials from other cases alleging infractions of the Act. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 146.

Appellant's acceptance of the constitutionality of the Arkansas separate-coach statute removes the Fourteenth Amendment and the Civil Rights Act from the case, and their discussion by appellant thus becomes irrelevant.

Whether or hot the Arkansas separate-coach statute applies to an interstate passenger is of no importance, unless it can be found to have controlled the Commission's decision to the exclusion of its own administrative judgment. An analysis shows that, while the Commission took notice of the statute, it dealt with the question of accommodations within the terms of the Interstate Commerce Act. The question of an undue or unreasonable preference or prejudice being one of fact and not of law, the Commission's decision that the present accommodations furnished colored passengers on the train involved meet the requirements of the Interstate Commerce Act is conclusive.

The several court decisions cited by appellant to support his contention that the Arkansas law does not apply to an interstate passenger are not pertinent, for none of them dealt with a proceeding in which the Interstate Commerce Commission had previously exercised its statutory power. They called for a different judicial power from that invoked here. This case in-

volves merely a request by appellant for an administrative ruling from a body whose limits of jurisdiction he was bound to know. Besides the cited cases do not establish finally that a State may not adopt a legislative policy, in the exercise of its police power, for the preservation of the public peace and order, even though such a policy may incidentally affect interstate commerce, in the absence of Congressional action occupying the same field. The Congress has enacted no legislation prohibiting the separation of races on interstate journeys, although this appellant, as a Representative, has introduced three bills to make such segregation unlawful.

The Commission's order is supported by substantial evidence. A single incident growing out of appellant's lack of diligence in making Pullman reservations does not lay a basis for a finding of undue or unreasonable preference or prejudice, and, therefore, it forms no basis for an order to cease and desist from a practice.

The proof shows that these appellees provide accommodations which, the Commission finds, meet the requirements of the Interstate Commerce Act. The Commission has not made mere volume of business the test of a right, but has merely permitted volume of business to determine the reasonableness of the capacity of accommodations furnished. This is properly within the expert discretion of the regulating body.

Appellant may lawfully act only for himself in this proceeding and may not assume to represent others who are unknown and whose interest in relief is speculative. Even his need of relief becomes obscure, since he has made other trips since April 21, 1937, from Chicago, Ill., to Hot Springs, Ark., but always over another route than that involved in this case. For the single incident presented in this case, appellant is seeking a common law remedy by an action for damages in the Circuit Court of Cook County, Illinois.

ARGUMENT.

1. Appellant's acceptance of the constitutionality of the Arkansas separate-coach statute must be construed as eliminating the Fourteenth Amendment and Civil Rights Act from consideration.

On page 75 of his brief under the title, "Questions Not Involved in this Appeal," appellant makes this statement:

> "In order that the issues involved in the case at bar may not be confused we wish to state:
>
> 1. *That the constitutionality of the separate-coach law of Arkansas has not been attacked in this proceeding* but only its unconstitutional application by the Commission on the claim of the defendant Rock Island, as shown by the uncontradicted and undisputed testimony of its witness Jones, that he was not acting under any rules or regulations promulgated by the Rock Island but, as the conductor of the train and in charge of its operation on behalf of the Rock Island, he was acting under cover of the Arkansas Separate-Coach Law (R. 178)."

This statement can only be construed as the acceptance by appellant, at least for the purposes of this case, of the constitutionality of the Arkansas statute, with a reservation challenging only its application to an interstate passenger. This acceptance necessarily carries with it recognition that the Arkansas statute conforms to the requirements imposed upon a State by the Fourteenth Amendment to the Constitution of the United States. Since that amendment asserts its force upon a State and no one else, it follows that the removal from this case of the constitutionality of the Arkansas

statute carries with it the removal of any and all issues under the Fourteenth Amendment.

This serves finally to dispose of much confusion which has attended the proceeding since its initiation before the Interstate Commerce Commission. In his complaint before the Commission appellant (R. 7) alleged that the action of defendants (the Rock Island, Illinois Central and The Pullman Company) in operating under the Arkansas law is in violation of "the Fourteenth Amendment of the United States Constitution in denying to petitioner equal protection of the laws." Since that amendment is directed at the State, a railroad obviously cannot violate it. The allegation submitted to the Interstate Commerce Commission a question over which it has no jurisdiction, for the Commission is an administrative agency of the Congress which has not been empowered to determine whether a statute enacted by a State Legislature contravenes the Fourteenth Amendment or any other provision of the Constitution.[4]

In his complaint before the United States District Court for the Northern District of Illinois, from which this appeal is taken, the appellant recites that the order and findings of the Commission (R. 39, par. 15) "are a denial of the equal protection of the laws to the plaintiff as guaranteed by the Fourteenth Amendment of the United States Constitution." Thus, in the court below (R. 39), appellant urged the failure of the Commission to accord him relief under the Fourteenth Amendment as among the errors entitling him to an order setting aside, annulling and vacating the Commission's order of dismissal. So, too, in his "Specification of Errors" before this Court (Appellant's Brief, pp. 15, 16, 17), appellant claims that the final order and decree of the

[4] "We are not here considering a constitutional question, but rather questions of the [Interstate Commerce] Act." (R. 27.) *Mitchell* v. *C. R. I. & P. Ry. Co., et al.*, 229 I. C. C. 703, 710.

District Court, sustaining the order of the Interstate Commerce Commission, was erroneous because it denies appellant the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment. A denial of the equal protection of the laws can flow only from a State statute which contravenes that amendment by its terms, or which might be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373.

Inasmuch as appellant now raises no question of the constitutionality of the Arkansas statute, any further discussion of the Fourteenth Amendment by appellant, either in his brief or elsewhere, becomes irrelevant.

In the Specification of Errors on page 15 of appellant's brief, the final order and decree of the District Court is declared to be erroneous because, among other things—

> "b. It was contrary to the laws passed by Congress under the Fourteenth Amendment to the Constitution and known as the Enforcement Act or Civil Rights Act Title 8, U. S. C. Chapter 3, Sections 41 and 43."

On page 64 appellant's brief discusses and quotes the Civil Rights Act, again referring to it on page 74. The equal-protection clause of the Fourteenth Amendment and the benefits of the Civil Rights Act, based upon that amendment, are only available as a prohibition against the States. *Ex Parte Virginia,* 100 U. S. 339.[5] The Civil

[5] "In the *Civil Rights case,* 109 U. S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the rground that the Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts." *Plessy* v. *Ferguson,* 163 U. S. 537, 546.

Rights Act was first passed in 1866 after adoption of the Thirteenth Amendment. It was reenacted in 1870, after adoption of the Fourteenth Amendment, and again in 1875. The Fourteenth Amendment is a limitation upon the power of the States. The Civil Rights Act, by which the Congress gave statutory effect to the provisions of the Amendment, is similarly confined. Neither applies in respect of equal protection of the laws to an order of the Interstate Commerce Commission. Appellant could invoke their provisions only in an attack upon the State statute.

Since the appellant accepts, for this case, the constitutionality of the Arkansas statute, all contentions made under the Civil Rights Act become as irrelevant as any further discussion by appellant of the Fourteenth Amendment.

2. Whether the Arkansas statute does or does not lawfully apply to interstate passengers becomes important only if the Commission's decision depended solely upon that statute, to the exclusion of the Commission's own administrative judgment.

In seizing upon the Commission's references to the Arkansas statute, in the apparent belief that the statute controlled the Commission's judgment, appellant is ignoring all the other facts and discussions which are found in the Commission's lengthy report. In exercising its functions under the Interstate Commerce Act, the Commission could have reached the conclusion which it reached, regardless of whether there was in existence such an enactment as the statute of Arkansas.

Section 3(1) of the Interstate Commerce Act condemns *undue* or *unreasonable* preference or advantage and *undue* or *unreasonable* prejudice or disadvantage. Section 15(1) empowers the Commission, after full hearing, if it shall find such a preference or prejudice to

exist, to make an order that the carrier or carriers shall cease and desist from such violation "to the extent to which the Commission finds that the same does or will exist." In his prayer, this appellant asked the Commission (R. 7) to enter an order "commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation of persons between the origin and destination points * named in paragraphs V and VI hereof, in lieu of the services and facilities named in said paragraphs V and VI, and such other services and facilities as the Commission may deem reasonable and just; and that such other and further order or orders be made as the Commission may consider proper in the premises."

Here the Commission was called upon by appellant to exercise its judgment upon the facts presented. Whether a preference or advantage is undue or unreasonable is a question of fact, not of law. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170; *Pennsylvania R. Co.* v. *International Coal Mining Co.,* 230 U. S. 184, 196; *Pennsylvania R. Co.* v. *United States,* 236 U. S. 351, 361. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to decide primarily whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *United States* v. *Louisville & N. R. Co.,* 235 U. S. 314, 320. "The courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the

* Chicago, Ill., and Hot Springs, Ark.

existence of forbidden preferences, advantages and discrimination." *United States et al.* v. *Chicago Heights Trucking Company, et al.*, 310 U. S. 344, 352. "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." *Rochester Telephone Corporation* v. *United States, et al.*, 307 U. S. 125, 139, 140.

As the basis for an order requiring railroads or other defendants in a proceeding before it to cease and desist practicing an undue and unreasonable preference or prejudice, the Commission must first find the factual existence of the unlawful preference and prejudice. As we have seen, that involves a question of fact. In the present case, the Commission made no such finding of unlawfulness; therefore, there was no unlawfulness to be corrected. The question which the Commission determined was not whether the Arkansas statute was unconstitutional, but whether the incident complained of by the present appellant constituted a violation of the Interstate Commerce Act and demanded the Commission's corrective order. If therefore the Commission reached a result within its administrative discretion, appellant may not validly claim error because the Commission took notice of the existence of the law of Arkansas. These appellees refer to the text of the Commission's report, which is too lengthy for convenient analysis at this point, for an exposition of the numerous facts and reasoning which underlie the Commission's conclusions, apart from the State statute. Some of these details will be emphasized in Title 5 of this argument, dealing with the evidence before the Commission.

The Commission's power, derived from the Interstate Commerce Act, concerns itself, not with the validity of a State statute, but with the question of whether an undue prejudice is practiced against the commerce that is subject to the Interstate Commerce Act. If, on an adequate record, the Commission shall find that no such undue preference or prejudice prevails as is condemned by the Act, its findings are conclusive. Similarly, if, on an adequate record, it finds the existence of such a violation, its judgment is final and its order is valid. *Houston E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342, 359.[7]

In the case last cited the Railroad Commission of Louisiana had filed with the Interstate Commerce Commission in March, 1911, a complaint which, in substance, alleged that interstate carriers maintained unreasonable rates from Shreveport, La., to various points in Texas and unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas.

The Texas rates were made under the compulsion of State authorities. After an extensive investigation of the facts, the Commission found that by the rate adjustment complained of "an unlawful and undue preference and advantage" was given to the Texas cities and a discrimination that was "undue and unlawful" was effected against Shreveport. The Commission ordered the removal of the unlawful preference and prejudice and prescribed the manner of accomplishing it. *Railroad Commission of Louisiana* v. *St. L. S. W. Ry. Co.,* 23 I. C. C. 31. The Commission there exercised the powers lodged in it under the third section of the Act. Whether, in that case, the state-made rates imposed an unlawful prejudice against shippers at Shreveport

[7] Commonly known as "the Shreveport Case."

and constituted an unlawful preference of Texas shippers was to be judged by the facts. The Commission had first to determine that the facts established an actual and unlawful discrimination before its power to remove such a condition could come into play. There, the Commission having arrived at its judgment, this Court in *Houston E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342, upheld its authority to exercise such a power. In the course of its opinion this Court (p. 357) said:

> "Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier and subject to the States or of the agencies created by the States."

In the *Minnesota Rate Cases,* 230 U. S. 352, this Court had before it for review the validity of the action of the State of Minnesota in establishing reduced levels of freight rates for intrastate transportation throughout the State. The Court was asked to hold that an entire scheme of intrastate rates fixed by the State of Minnesota was null and void because of its effect upon interstate rates. But there had been no finding by the Interstate Commerce Commission of any unjust discrimination. This Court said (p. 419) * * * "the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the Courts."

Appellees emphasize that in the two cases just cited the major subjects were rates fixed under the law of States, and that in both instances the doctrine was firmly established that the determination of whether

such State regulations constituted an unlawful discrimination against interstate commerce belonged to the Interstate Commerce Commission.

It has become a common thing for the Commission to exercise its judgment, in situations brought to its attention, upon the lawfulness of state-made intrastate rates in their relation to interstate rates. In numerous instances the Commission has found that lower intrastate rates enforced by state authority, although applying over identical routes and railroads, are not shown to effect, in fact, an unlawful discrimination against interstate commerce. *Western Trunk Line Class Rates,* 197 I. C. C. 57; *Rates on Raw Dolomite and Fluxing Stone Within State of Ohio,* 188 I. C. C. 495; *Emergency Freight Charges Within Montana,* 214 I. C. C. 537; *Emergency Freight Charges Within Idaho,* 213 I. C. C. 130; *Emergency Freight Charges Within Oklahoma,* 211 I. C. C. 23; *Emergency Freight Charges Within Kansas,* 211 I. C. C. 225. In each case the result depended upon the particular facts. The Commission exercised its judgment wholly apart from the State law.

Appellees respectfully submit that the foregoing establishes the soundness of these propositions: (1) It is for the Commission and not for the Court to determine whether the effect of a State statute is to impose an undue and unreasonable prejudice against interstate commerce; (2) whether the effect is undue or unreasonable is a question of fact wholly within the province of the Commission to determine; (3) as a basis for an order to cease and desist practicing an undue or unreasonable preference or prejudice, the Commission must first have found such an unlawful condition to exist. While it is true that the Commission took notice of the Arkansas statute, it expressly said (R. 28; Commission's Report, p. 710) that "it is not for us to con-

strue the statute," that (R. 28; Commission's Report, p. 710) the carriers could pursue the practice of segregating the races "even if there were no statute," [a] and (R. 29; Commission's Report, p. 711) "it is not for us to enforce the State law," since it understands "that to be a matter for State authorities." Appellees, therefore, respectfully assert that appellant overemphasizes the State statute for the purpose of raising questions of law in a proceeding that rests upon questions of fact.

The ultimate question submitted to the Commission related to the character of facilities provided for colored passengers on the train from Chicago, Ill., to Hot Springs, Ark. The Commission's administrative jurisdiction over this issue, so far as undue and unreasonable prejudice or preference is concerned under Section 3 of the Act, is not doubted. The Commission makes plain in the final language of its report that its findings are within and are based on the terms of the Act which it administers. It is only with respect to segregation, and nothing else, that the Commission recognized "that under the State law defendants must segregate colored passengers," a practice which, as already pointed out, "the carriers could follow even if there were no statute." This amounts to no more than the recognition by the Commission in this case of a doctrine which it has enunciated and adhered to in all proceedings of this general nature which have been brought before it. In *Councill* v. *W. & A. R. Co.*, 1 I. C. Reports, 638, 641 (1887) the Commission held that "there is no undue prejudice or unjust preference shown by railroad companies in separating their white and colored passengers by providing cars for each, if the cars so provided are

---

[a] *Chiles* v. *Chesapeake & O. R. Co.*, 218 U. S. 71.

equally safe and comfortable."[9] The doctrine was followed in *Heard* v. *Georgia Railway Co.*, 1 I. C. Reports, 719; *Edwards* v. *N. C. & St. L. R. Co.*, 12 I. C. C. 247; *Gaines* v. *Seaboard Airline Railway, et al.*, 16 I. C. C. 471; *Evans* v. *Chesapeake & Ohio Ry. Co.*, 92 I. C. C. 713. The Commission's report (p. 707) in the instant proceeding cites four of those decisions. Thus, since the Commission, over a long period of years and for public reasons considered in its several decisions, has consistently upheld as reasonable the separation of races on interstate travel, its reference to the segregation required by the Arkansas statute adds nothing to the case as a consideration controlling its conclusion. Stated differently, since the Commission for fifty-three years has construed Section 3 of the Interstate Commerce Act as not prohibiting the separation of races in interstate commerce, its administrative judgment in the present case cannot be said to rest, as appellant seems to argue, solely upon the statute of Arkansas.

The reasoning by which the Commission supported

---

[9] In the case just cited the Commission said (p. 641):

"The people of the United States, by the votes of their representatives in Congress, support the public schools of the country's capital city, and here white and colored children are educated in separate schools. Congress votes public moneys to separate charities; men, black and white, pitch their tents at the base of Washington's Monument to compete in the arts of war in separate organizations. Trade unions, assemblies, and industrial associations maintain and march in separate organizations of white and colored persons.

"Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or unjust preferences in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both."

The Commission had warrant in the present case for assuming that Appellant Mitchell raised no issue as to segregation. It was the appellant who offered portions of the Arkansas statute at the hearing before the Commission's examiner (R. 125; text of statute, R. 211), and it was Appellant Mitchell himself who told the examiner (R. 156) that "The question of segregation is not involved." The Commission refers to the statement, p. 710 of its report (R. 27). In the trial below Appellant Mitchell made the same statement to the three-judge court (R. 227).

its doctrine that segregation of itself does not constitute an unreasonable discrimination differs in no material respect from the reasoning of this Court in its ruling that a statute of Louisiana requiring separation of the races on passenger trains was not a discrimination prohibited by the Fourteenth Amendment. *Plessy* v. *Ferguson,* 163 U. S. 537. Nor does it differ in any material respect from the reasoning of this Court in *Chiles* v. *Chesapeake & O. R. Co.,* 218 U. S. 71, wherein it was held that a railroad's regulation requiring the separation of races on passenger trains, even in connection with the travel of interstate passengers, was not unreasonable, provided substantially equal accommodations were furnished.

If separation is practiced, there must be no such differences in accommodations furnished as to constitute, as a question of fact, an unlawful preference or prejudice in violation of the Act. The Commission has decided this question of fact by holding that the facilities furnished meet the requirements of the Act. That, appellees respectfully submit, should be conclusive.

3. Court decisions cited by appellant have not dealt, in any instance, with a case in which the Interstate Commerce Commission previously exercised its statutory authority to determine an issue raised under the Interstate Commerce Act.

The several court decisions cited by appellant as sustaining his contention that the Commission erred by taking notice of the Arkansas statute have two major weaknesses.

1. Not one of them reviews the exercise by the Interstate Commerce Commission of its statutory authority to determine questions assigned to its jurisdiction by the Congress of the United States.

2. Not one of them from this Court has nullified the

separate coach statute of Arkansas or any other State as a regulation of interstate commerce, and none of them has so foreclosed the question as to deprive the Commission of its regulatory discretion under the Interstate Commerce Act.

It is not necessary to consider more than three of the cases mentioned by appellant, since the others must necessarily be tested by the same considerations.

I. *Hall* v. *De Cuir*, 95 U. S. 485 (1877). In 1869 Louisiana passed a statute requiring all those engaged in the transportation of passengers to give all persons traveling within the State equal rights and privileges in all parts of their conveyances (in this case a steamboat) without distinction on account of race or color. The Supreme Court of Louisiana construed the statute as applying to interstate as well as intrastate travel. Having before it the interpretation of the State law by the Supreme Court of the State, this Court said (p. 487): "Such was the construction given to the act in the courts below, and it is conclusive on us as the construction of a State law by the State courts." "The line which separates the powers of the States," said the opinion (p. 488), "from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." The Court held that the statute as construed by the State Supreme Court infringed upon the commerce clause. It ruled that Congressional inaction left the steamboat master at liberty to adopt

such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage in Louisiana and without, as seemed to him most for the interest of all concerned. Referring to the Louisiana statute, the Court said (p. 490): "if the public good requires such legislation it must come from Congress and not from the States."

The cited case was decided ten years prior to the assertion by Congress of its power to regulate interstate commerce by the enactment of the Interstate Commerce Act, the creation of the Interstate Commerce Commission and the prescription of rules and regulations which that Commission was authorized to administer. Even the "reasonable rules and regulations" which this Court at that time left in the power of the steamboat master have been placed (so far as interstate railroads are concerned) under the control of the Interstate Commerce Commission.

It is noteworthy that in the first year of its existence (1887) the Commission was called upon to pass upon railroad regulations affecting interstate colored passengers, and accommodations provided for members of that race. *Councill* v. *W. & A. R. Co.*, 1 I. C. Reports, 638. It was then that the Commission first assumed jurisdiction of the subject under Section 3 of the Interstate Commerce Act, a jurisdiction which it has exercised ever since.

It was the jurisdiction of the Commission that this appellant invoked in submitting his complaint to that body for adjudcation. In the light of the doctrines of the Shreveport case, *Houston E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342, and the *Minnesota Rate cases*, 230 U. S. 352, it is wholly conceivable that the situation dealt with in *Hall* v. *De Cuir* would now require the primary exercise of the Commission's judgment insofar

as an alleged discrimination by a railroad under the Interstate Commerce Act might be involved. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *Armour & Company* v. *Alton R. R. Co., et al.*, ... U. S. ....., decided February 3, 1941.

II. *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151 (1914). Appellant cites this case as a support of two of his contentions.

First, that it affirmatively and conclusively settled the inapplicability of a separate-coach law of a State to interstate passengers. (Appellant's brief, p. 23) We do not find in the Court's language any such finality. The Court did not decide the question. A separate-coach statute of Oklahoma had been attacked as being, among other things, repugnant to the Fourteenth Amendment and the commerce clause. The Supreme Court of Oklahoma had given the statute no interpretation. This Court, in the absence of a different construction by the State court, construed it as applying to transportation exclusively intrastate, as a means of resolving the open constitutional question into one which this Court had passed on in prior cases. By construing the Act thus, the Court found that it was constitutional, in conformity with *Louisville N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 590, and other cases cited in the Court's opinion. Aside from *Hall* v. *De Cuir, supra,* which was discussed above, appellees have found no case in which this Court has nullified a State statute of this nature.

Second, appellant cites the case (Appellant's brief, pp. 34 to 37) as supporting his claim to accommodations identical with those supplied other passengers holding similar tickets. This exposes some important contradictions in appellant's arguments. While maintaining that a State statute does not apply to interstate passengers, he relies now upon a State statute as determining his

rights as an interstate passenger. In the *McCabe Case*, this Court was meeting certain contentions of the Attorney General of Oklahoma concerning the scope and meaning of the Oklahoma statute (p. 161), although the Supreme Court of Oklahoma had given the statute no construction whatsoever. The questions arose there under the impact of the Fourteenth Amendment upon a State's enactment and the definition of that enactment by an officer of the State. Since the Arkansas statute in this case is admittedly not under attack as unconstitutional, the Fourteenth Amendment, as heretofore pointed out, has no pertinence here such as it may have had in the Oklahoma case. Appellant may not validly reject a State statute as not applying to an interstate passenger, and yet measure his rights by the interpretation of a similar State statute.

Appellant apparently mistakes the difference between the functions of the Interstate Commerce Commission under the Act which it administers and the functions of the Court in passing upon the Oklahoma statute. Under the Fourteenth Amendment the statute had to provide for equal accommodations. The Interstate Commerce Act, on the other hand, employs no such phrase. It condemns only preferences and prejudices which are undue or unreasonable, and these are questions of fact to be determined by the Commission within the framework of that Act and corrected "to the extent to which the Commission finds that the same does or will exist." But even as used in a State statute, the equality demanded is to be substantial, not identical. In the case now discussed, under a State law, this Court (p. 161) goes no further than to call for "substantial equality." In *Chiles* v. *C. & O. R. Co.*, 218 U. S. 71, this Court sustained the action of the railroad in transferring a colored passenger from a white coach into a colored compartment coach. The coaches were not identical, but the Court found

them *substantially equal* in quality, convenience and accommodations. It is obvious that the car, divided by board partitions into three compartments, was assigned to colored passengers because the volume of colored travel would not justify the assignment of an entire coach.

It is well established that the word "equal" does not mean "identical." The Supreme Court of Arkansas, dealing with the separate coach law of that State, *Choctaw, O. & G. R. Co.* v. *State,* 87 S. W. 426, said (p. 427):

> "What one man or set of men might consider sufficient would not be so considered by another. The same may be said of the word 'equal.' The accommodations need not be the same within the meaning and spirit of the statute; its object being to prevent discrimination. In this sense, one might consider accommodations equal, when another would not."

What may be equal accommodations within the purview of a State statute is a question primarily to be decided by the State courts of the State concerned. It is not shown that this appellant has made any resort to the Arkansas courts. Appellant may not properly, apart from the contradiction in position heretofore mentioned, base a claim on a State statute and apply to the Federal regulatory body to enforce it.

Appellant charges that the Commission has permitted his rights to be controlled by mere volume of business, and he cites the *McCabe Case* as demonstrating that body's error. Here, appellees believe, the appellant has read into the Commission's report something which is not there and has misconceived the rational purpose of the regulating body. The Commission has not determined rights on the basis of volume of traffic, but has only passed upon the measure of the capacity necessary to accord those rights—the volume of accommodations

required for colored passengers in view of the very slight demand for such accommodations. This, of course, is a quite different thing. It is wholly within the Commission's duty to consider the public interest in the avoidance of wasteful and unnecessary services by interstate carriers. It is not called upon to require accommodations for imaginary travelers. It finds that present accommodations meet the requirements of the Act, and that the discrimination and prejudice is plainly not unjust or undue.

III. *State of Missouri ex rel. Lloyd Gaines* v. *Canada*, 305 U. S. 337. This case presented a direct attack upon the State of Missouri for denying a colored student admission to the law department of the University of Missouri, on the ground that the State violated the provisions of the Fourteenth Amendment by denying the student the equal protection of the laws. The facts need not be rehearsed. The case combined a State law, a State's conduct and the Fourteenth Amendment. Except that a colored student was involved, it is difficult to discern any remote legal connection between that case and the proceedings now before this Court. In the first place, the case did not involve commerce. In the second place, Congress had not provided for a determination of the complaint by an administrative agency. Third, the judicial power invoked differed decidedly from the judicial power engaged by an action before a special three-judge court to set aside and annul an order of the Commission in an adjudicated case.

Were the case otherwise pertinent, it would present one uncompromising difference. There the exclusion of the student from the State University was continuous. Here the exclusion was casual, on a single run of a train which runs three hundred and sixty-five days a year and on which sufficient accommodations are provided for

colored passengers who show the same diligence as white passengers in making reservations.

4. This Court has sustained laws of States enacted to meet local conditions, even though they incidentally affect interstate commerce, when congressional legislation has not occupied the field.

Maintaining unreservedly the position heretofore expressed, that the statute of Arkansas is important only if the Commission's decision depended solely upon that statute, to the exclusion of the Commission's administrative judgment; that the Commission's report shows that it represents an exercise of the body's administrative judgment, and that this Court has not annulled the Arkansas statute or any other similar State statute, as is contended by appellant, these appellees now present reasons for the view that the State statute may have more force in its relation to interstate passengers than appellant now, after completely shifting his position, concedes to it.

Appellees are led to this discussion by appellant's repeated statements that both the railroads and the Commission should know that the State statute was of no effect.

It is common knowledge that approximately a quarter of the forty-eight states have laws similar to that of Arkansas, and, in the absence of a different construction by a State Supreme Court, they are enforceable against all passengers traveling within the State. These appellees are neither lawmakers nor law interpreters, but are subjects to law. They may not arbitrarily ignore or defy such an enactment, and their employes on trains are, as individuals, subjected to penalties for violations. They take no position concerning the merits of the practice of separation required by the statutes, but they must give heed to the legislative policy thus

imposed and to the community sentiment upon which that policy rests. Let us repeat, that the question before the Commission was not, and could not be, the validity of the State statute, but only one involving an alleged undue preference and prejudice under the terms of the Interstate Commerce Act, whether or not the Arkansas statute existed.

It is true, as stated in appellant's brief (p. 28), that the Supreme Court of Maryland in *Hart* v. *State,* 60 Atl. 457 (1905), affirmatively held that the separate coach law of Maryland was void in so far as it applied to interstate passengers. There have been no such judgments among the southern State courts in general.

The doctrine underlying such statutes as that of Arkansas seems to be that the State is within its sovereign rights in asserting its police power, in view of local conditions, to enact measures for the preservation of peace and order, entirely apart from any relation to commerce as such. At least two State Supreme Courts have held segregation statutes to apply both to intrastate and interstate passengers.

In *Alabama & V. Ry. Co.* v. *Morris* (1912) 103 Miss. 511, 60 So. 11, the Court in discussing the Mississippi segregation statute stated (pp. 13, 14):

> "The statute was not enacted with any idea of discriminating against the members of either race; nor was it prompted by prejudice or passion, but with the knowledge that the enforced intermingling of the races would be distasteful to both races, would inevitably result in discomfort to both, and provoke and encourage conflicts endangering the peace and quiet of the commonwealth. * * *
>
> "This statute has been upon our books for many years, and has caused no complaint or criticism from the inhabitants of the state. * * *
>
> "The two races here accept the law as a wise and necessary exercise of the police power of the

state for the protection of members of both races. No greater punishment could be inflicted upon the average negro traveler than being obliged to sit in the coach set apart for whites, and our colored fellow citizens would be the first to oppose a repeal of the statute.

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississipian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. * * *

"If the peculiar conditions existing here demanded this legislation to conserve the peace of the State, and our lawmakers have so decided, the mere fact that the passenger is going out of the State, coming into the State from without, or traveling across the State, does not alter the complexion of affairs nor render the danger less, should a negro or white man be required, against his will, to occupy a car with passengers of another race.

"Each section of our common country has its own problems, and the laws of one State may not be necessary in another State; * * * The statute in question, rather than burdening the carrier, is an aid to the peaceful operation of its business; and we have no doubt that its overthrow would create intolerable conditions from which the railway company would be the first and greatest sufferer."

To the same effect: *Southern Ry. Co.* v. *Norton* (1916) 112 Miss. 302, 73 So. 1; *Southern Ry. Co.* v. *Primrose* (1916) 73 So. 2; and *Smith* v. *State* (1898) 100 Tenn. 494, 46 S. W. 566.

The exercise of the State regulatory power has often been sustained, although it has incidentally affected or has even burdened or impeded interstate commerce. In *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453, and

St. L. I. M. & S. R. Co. v. *Arkansas,* 240 U. S. 518, this Court held that an Arkansas statute, applying both to intrastate and interstate railroad trains, which required certain numbers of men in their crews was a valid exercise of the State police power and was not void as a burden on or interference with interstate commerce. So long as the State action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the States in the absence of Congressional action constitutionally exercised in the same field. *South Carolina Highway Department* v. *Barnwell Bros.,* 303 U. S. 161; *Maurer, et al.* v. *Hamilton, et al.,* 309 U. S. 598; *Eichholz* v. *Public Service Commission of Missouri, et al.,* 306 U. S. 268. In the last case cited, this Court said:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Morgan's S. S. Co.* v. *Louisiana,* 118 U. S. 455; *Smith* v. *Alabama,* 124 U. S. 465; *Kelly* v. *Washington,* 302 U. S. 1, 9, 10."

The foregoing utterances from this Court appear to negative a quotation from Mr. Justice Miller (Appellant's brief, p. 29) in *Railway Company* v. *Illinois,* 118 U. S. 557, to the effect that "this court holds now, and has never consciously held otherwise, that a statute of a State intended to regulate or to tax, or to impose any other restriction upon the transmission of persons or property or telegraph messages from one State to another is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the

State." Attention is called especially to the word "tax" in the foregoing quotation. In recent cases involving the levy of certain State taxes, arguments were forcefully presented that the taxes were a burden upon and an interference with interstate commerce, in like manner that appellant now urges his contention against the Arkansas statute. This Court upheld such taxes. *Henneford* v. *Silas Mason Company,* 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33; *Nelson* v. *Sears Roebuck & Co.,* ..... U. S. ....., decided February 17, 1941. In the last cited case, Mr. Justice Douglas, speaking for the Court, said:

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever imbedded in general propositions, does not facilitate an answer to the present problem."

In the light of doctrines and decisions thus considered, appellees were and are without an alternative to the observance of the statute of Arkansas.

If one of the purposes of appellant was to have the practice of segregation, whether under the State statute or not, declared to be unlawful, it may be remarked that he asked the Interstate Commerce Commission, an agency of Congress, to enact legislation which the Congress itself has declined to adopt.

It cannot be questioned that Congress, under the commerce clause of the Constitution, has power to make unlawful the segregation of interstate passengers, thereby occupying the field and dispossessing the States of such power as they now exert over the subject. The Commission, as previously shown, has consistently held

that segregation in itself is not a prohibited discrimination under the Interstate Commerce Act. It merely adhered to its adopted doctrine in this proceeding. The Congress is presumed to be advised of the activity of its agent, as well as the existence of the legislative policy of the numerous States having separate coach laws.

The journals of the two Houses of the Congress are judicially noticed by Federal courts. *U. S.* v. *Lowden, et al.,* 308 U. S. 225, 237, 239. 23 Corpus Juris 102, Sec. 1902. The lower court was asked by appellees to take judicial notice of bills offered in the Congress dealing with this subject (R. 250). The same request is made of this Court.

On January 5, 1938, Representative Mitchell, the appellant herein, introduced in the House of Representatives a bill, H. R. 8821, to amend the Transportation Act (U. S. C. title 49, sec. 3(1)) by adding the following:

> "It shall be unlawful to segregate any persons traveling as interstate passengers on any carrier subject to the provisions of this Act, or in railroad stations, waiting rooms, rest rooms, lunch rooms, restaurants, dining cars, or in any other accommodations provided for passengers traveling interstate, on account of such passengers' race, color, or religion; and any such discrimination or attempted discrimination shall subject the offending carrier, its officers, agents, servants, and employes, to the penalties hereinafter provided for violations of this Act."

The bill was referred to the Committee on Interstate and Foreign commerce. It was never reported out.

On January 3, 1939, the Representative reintroduced the bill, H. R. 182, which was referred to the same committee. It was never reported out, although during the subsequent period the committee was engaged in

studying and developing extensive revisions of the Interstate Commerce Act which were finally enacted and approved September 18, 1940, as the Transportation Act of 1940.

On January 3, 1941, the Representative introduced the same bill in the House of Representatives, and again it was referred to the Committee on Interstate and Foreign commerce. H. R. 112, 77th Congress, 1st Session.

The subject, therefore, is now before the Congress for disposition. Perhaps the complainant thus has his proposal of a national legislative policy before the proper forum, wherein the elected representatives from forty-eight States may determine whether the sovereignity exercised over the subject by approximately a quarter of the States is to be overruled by Federal action.

It is significant that, despite many years of agitation and repeated court decisions sustaining State policies of segregation, the Congress has not seen fit to enact legislation bearing directly on this controversial subject.

5. Appellant may not complain except in his own behalf, and he must establish his individual need of the remedy asked.

When the case is stripped of confusing allegations and arguments, it is revealed as a complaint before the Interstate Commerce Commission which invoked only the authority and jurisdiction which the Commission possessed. It was this appellant who elected to proceed before the Commission within the confines of the Interstate Commerce Act, and he may not complain because the Commission exercised only such authority as the Congress had conferred on it.

In his complaint before the Commission, this appellant alleged a single incident, the one in which he figured

(R. 3). Nor was any other witness produced who had a like experience. Yet, appellant (the complainant there) undertook to aver that "said *practice* of the defendants * * * causes undue and unreasonable prejudice to this complainant and *all colored persons* who in the future will use, as interstate passengers, the lines of the said defendants." Defendants objected at the hearing to expanding this case beyond the issue relating to this individual plaintiff on the particular train of April 21, 1937, an objection to which they adhered through the proceeding before the Commission. Commission's report, p. 704. The Commission overruled the objections. Since, however, the appellant introduced proof of but the single incident, the proof hardly met the wide allegations of undue and unreasonable prejudice to "this complainant and *all other colored persons.*"

The prayer was that the Commission make an order commanding "said defendants and each of them to desist from the aforesaid violations of said Act and establish and put in force and apply in future to the transportation of persons between the origin and destination points named in paragraphs V and VI hereof, in lieu of the services and facilities named in said paragraphs V and VI, and such other services and facilities as the Commission may deem reasonable and just." Recurrence of such an incident may not be assumed. Inasmuch as no other examples have been submitted and the train has been running daily, both before and since April 21, 1937, the failure to prove any other or similar experiences is significant.

In the circumstances, these appellees submit that the complaint before the Commission could involve no individual except only this appellant. There is no evidence that this appellant had ever before or since been unable to obtain Pullman accommodation on the train in question. There is no evidence that he ever will be deprived

of accommodations in the Pullman from Chicago, Ill., to Hot Springs, Ark.

Addressing the court below, as plaintiff and as his own counsel, the appellant (R. 255) said: "As a matter of fact, I have been down to Hot Springs several times since this thing happened. Of course, I have not gone down there on the Rock Island Railroad."

If that statement does not make the issue moot so far as this individual is concerned, it at least establishes that his interest in the relief sought is theoretic and not real. As the proof shows, and as the Commission finds (R. 29), Pullman accommodations of adequate capacity are provided. If, by exercising the ordinary diligence of average travelers, appellant had obtained such accommodations on subsequent trips, this case would have been destroyed.

Nor may this appellant properly complain in behalf of any one other than himself.

In *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151, five negro citizens of the State of Oklahoma filed a suit in the United States District Court against five railroad corporations to restrain them from complying with the State statute of Oklahoma, about to become effective, requiring separate but equal accommodations for white and colored races. After the Act had been in operation for a few days an amended bill was filed seeking specifically to enjoin compliance for the alleged reasons that the Act was repugnant to the commerce clause of the Federal Constitution, the Enabling Act and the Fourteenth Amendment. This Court, affirming the lower court's dismissal of the injunction suit, rejected the right of the five plaintiffs to act for anyone other than themselves. The Court ruled (p. 162):

> "There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It

> was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect and this amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be a 'multiplicity of suits,' there being at least 'fifty thousand persons of the negro race in the State of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. *Williams* v. *Hagood*, 98 U. S. 72, 74, 75; *Virginia Coupon Cases*, 114 U. S. 325, 328, 329; *Tyler* v. *Judges*, 179 U. S. 405, 406; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Davis & Farnum* v. *Los Angeles*, 189 U. S. 207, 220; *Hooker* v. *Burr*, 194 U. S. 415, 419; *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 197; *Collins* v. *Texas*, 223 U. S. 288, 295, 296."

It is true that the above quotation related to relief sought from a court of equity, not from the Interstate Commerce Commission. But its pertinence is evident, for here we have a case in which the Commission was asked to enter an order which in its force and effect would be injunctive, and this court, with its equitable powers is, in turn, asked to annul a Commission's order refusing relief to a complainant in circumstances similar to those in the *McCabe Case*.

The Court concluded (p. 164):

> "Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, *he will not have an adequate remedy at law*. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that *his individual need* requires the remedy for which he asks."

That this plaintiff has a remedy at law is evident by his pending action for damages in the Circuit Court of Cook County, Illinois, based upon the incident involved herein (R. 90).

That the case is that of an individual is further supported by the petition to the lower court (paragraph XXVIII) in which it is alleged (R. 39) that "the plaintiff will suffer irreparable loss and damage unless the said order entered November 7, 1938, be set aside, annulled and vacated." Apart from plaintiff's failure to prove irreparable loss and damage, the allegation is plainly confined to the plaintiff alone.

6. Commission's report and order are supported by substantial evidence, and the finding of the lower court should be affirmed.

In alleging, as he does, that the Commission's report and order are not supported by the evidence, or that they are contrary to the evidence, appellant fails to give to the Commission's judgment the conclusive force which this court consistently ascribes to it. Even without a survey of the transcript of evidence before the Commission, a reading of the Commission's report based on that evidence proves by itself that the Commission's decision rested upon substantial evidence, from which

the Commission was empowered to draw its own inferences.

Little need be said concerning the colored coach into which the appellant was moved. Practically all the testimony of five witnesses produced before the Commission by the appellant consisted of their recollections as to coaches assigned for colored travel on the Rock Island in Arkansas. Since some of it went back as far as 1904 and 1926 and other past periods, its relation to Appellant Mitchell's trip in 1937 was, to say the least, remote. The Commission's report contains the appellant's description of the colored compartment car in the train on which he rode, a description which was rebutted by employes of the Rock Island railroad familiar with the coach. The appellant sought from this Commission an order covering the future. The fact that the colored coach at that time in use was displaced in July, 1937, by a new and improved type of car removed the issue as to coach accommodations. The Commission describes the new coach in detail, and it affirmatively finds that "the combination coach is as fully desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fare."

As to Pullman accommodations, the Commission draws attention to the fact that the complaint mentions but a single incident of alleged discrimination and prejudice, the one in which this appellant was involved. In his complaint before the Commission, appellant alleged that it was on April 20, 1937, that he applied for a ticket and a Pullman bedroom from Chicago, Ill., to Hot Springs, Ark. That was on the day of the train's departure. The conductor of the Rock Island's train testified (R. 130) that when the appellant applied for a seat in the Pullman he made an effort to find one for him in a Pullman drawing-room or compartment, but the rooms were occupied. The Commission finds that the use of

one of the drawing-rooms would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent fare being applicable. "Occasionally they are used by colored passengers," the Commission states, "but in this instance both drawing rooms were already occupied by white passengers." The Commission finds that "only one negro to twenty white passengers rides this train from and to points on the line between Memphis and Hot Springs, and there is hardly ever a demand from a colored passenger for Pullman accommodations." The Commission cites the conductor's estimate that the demand from colored passengers for Pullman accommodations did not amount to one per year. In this connection, the train conductor (R. 138) testified that if at the time there had been a vacant drawing room in the Pullman car he would have put the appellant in there. He testified (R. 145) that, considering the number of colored persons who travel in Pullmans on this train, the drawing-rooms and compartments are adequate to take care of all who desire Pullman accommodations. Ordinarily, he testified, he can accommodate in a drawing-room or in a compartment the colored applicant for Pullman accommodations and at the same time comply with the Arkansas law (R. 147). When the witness has a drawing-room or compartment available (R. 149) he puts the colored passengers in that space, leaving the door open, fronting out on the aisle, and the passenger pays only a seat fare.

After examining all the proof offered by all parties, the Commission resolved the case into its proper and quite simple proportions. It found that the appellees provide accommodations which meet the requirements of the Act. Appellees stress here the circumstance that appellant had shown no diligence in undertaking to make

reservations, and that it is a common experience of travelers to find accommodations, otherwise adequate, unavailable because of their own delay. This does not mean that accommodations are denied to a passenger, or that they are insufficient to supply the normal demand.

If the Rock Island railroad operated a separate Pullman car for colored passengers between Memphis, Tenn., and Hot Springs, Ark., and that car happened to be filled to capacity on a particular day it would be extravagant to claim that any additional colored passengers would have ground for a claim of unlawful discrimination by reason of the fact that the accommodations, ordinarily sufficient for all travel, were insufficient on the day in question.

That is essentially what a railroad does when it assigns the colored passenger to a Pullman compartment or drawing-room. Those accommodations are ordinarily enough to take care of colored travel. On the day that Mitchell made his trip they were not enough. It is immaterial that they happened to be occupied by white persons. If they had been occupied by colored passengers the prior purchase of available facilities would have created the same situation.

In *Gaines* v. *Seaboard Air Line Co.*, 16 I. C. C. 471, 475, the Interstate Commerce Commission used this pertinent language:

> "Throughout the record an attempt was made on behalf of complainants to prove that colored passengers are discriminated against in the sale of accommodations on train No. 38 of the Southern Railway. This train and its companion No. 37, running in the opposite direction, are the finest trains on that road. It is composed exclusively of Pullman cars and has the desirable features of a club car and an observation car. It runs upon a limited schedule between New Orleans and New York, and

reservations on this train are in great demand at every station where it stops. * * * Reservations for space must often be made days in advance.

"That colored people at Atlanta find it impossible to get reservations on that train within a few hours of the time of departure indicates absolutely nothing in the nature of discrimination. White people are glad to get such reservations and put themselves to some trouble in advance to get them.

"This case was heard at Atlanta on the 17th, 18th, and 19th of September, 1908; September 19 three Interstate Commerce Commissioners desired to get reservations on train No. 37, New York-New Orleans Vestibuled Limited, from Washington to Atlanta and failed; they were obliged to take a slower train without a club and observation car, and over a longer route."

The three Commissioners referred to in the foregoing evidently did not regard themselves as having been victims of an unlawful discrimination.

In that case (p. 476) the Commission found, as it did in the present proceeding, that in compliance with the laws of Georgia and the sentiment there "negroes are assigned to the drawing room, or separate compartments, so far as possible, even in interstate travel." It found that undue discrimination or prejudice had not been shown, and the complaint was dismissed. In the course of its report it found (p. 474) that the proportion of negro to white passengers on long journeys, such as make sleeping accommodations necessary, is infinitesimal.

It is not for a court to weigh the evidence or to derive therefrom its own inferences. After much discussion in which appellant appears to ask this court to determine the weight of the evidence and to exercise its judgment thereon, appellant says (p. 76 of his brief):

"We are not asking this Court to consider the weight of conflicting evidence nor the wisdom of the order entered by the Commission. Such request, we know, would be unavailing under the decisions of this Court, nor to substitute its judgment on conflicting evidence for that of the Interstate Commerce Commission on matters purely administrative, nor to consider the credibility of witnesses."

In that paragraph appellant correctly states the law as it has been repeatedly expressed by this court. The quotations, excerpts and abstracts of testimony which appellant scatters through his brief and its appendix in an effort to establish a conflict in evidence are without any relevancy whatsoever to the issue before this court.

The issue is not whether there was conflicting evidence, but only, and strictly, whether there was substantial evidence upon which the Commission may have reached its conclusion. The right or the wrong of such conclusions, so far as they represent an exercise of the Commission's statutory discretion, is not for the court to consider. These appellees, therefore, are not called upon to give any attention to such material found in appellant's brief and the appendix thereto.

Since the decision in *Rochester Telephone Corporation* v. *U. S., et al.,* 307 U. S. 125, so-called "negative" orders of the Commission—into which category the present Commission's order would fall—are treated for purposes of review similarly to the so-called "affirmative" orders, and, hence, become reviewable. But this court was careful to point out that this decision did not enlarge the scope of review. It restated the limited range of review that is open to one appealing from an order of an administrative body:

"Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting Con-

stitutional power, statutory authority and the basic requisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific Railroad,* 222 U. S. 541."

This review presents no questions of the Commission's constitutional power or statutory authority. It is but a step in the proceedings instituted by the appellant before the Interstate Commerce Commission, and its scope must be limited to questions which are proper for the Commission's consideration within the definitions and limits fixed by the Act under which it functions.

This court concluded its opinion in the *Rochester Telephone case* with this pertinent language (p. 146):

> "So long as there is warrant in the record for the judgment of the expert body it must stand * * * Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 2860287; *Swayne & Hoyt Ltd.* v. *United States,* 300 U. S. 297, 303 *et seq.*"

This court stated in *Manufacturers Railway Co.* v. *United States,* 246 U. S. 457 (at p. 481):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170), and upon which its decisions, made the basis of admin-

istrative orders operating *in future,* are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of sections 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. 589-591, c. 3591; 36 Stat. 551-554, c. 309), expounded in familiar decisions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452, 469-470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 547; *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 297-298; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91.

"In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. 28 I. C. C. 104, 105; 32 I. C. C. 102. The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done. *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361.

Recently this Court had another opportunity to define the limits of review on an appeal from an order of the Commission. In *The United States of America, et al.* v. *Chicago Heights Trucking Company, et al.,* 310 U. S. 344, 352, certain trucking companies had filed a tariff with the Commission, which that body suspended, pend-

ing investigation into its lawfulness. *Although only evidence supporting the tariffs* was introduced, the Commission found the tariff unlawful and ordered its permanent cancellation. A minority opinion was also released. The trucking companies appealed to a three-judge court, which enjoined the Commission's order.

In reversing the court below and ordering dismissal of the suit, this court stated at page 352:

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. And where a court substituted 'its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, (the court) obviously exerted an authority not conferred upon it by the statute.' *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

This language is particularly applicable to the present proceeding. Holding that "only differences in treatment that are unjust or undue are unlawful and within the power of this Commission to condemn, remove, and prevent," the Commission, expressly finding that no such unlawful differences existed, dismissed the complaint.

The determination of the Commission, after its application "of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination," should not be disturbed. There should be "ascribed" to it "the strength due to the judgment of a tribunal appointed by law and informed by experience." *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454.

Accordingly the order of the District Court dismissing the petition should be affirmed.

WALLACE T. HUGHES,
LOWELL M. GREENLAW,
VERNON W. FOSTER,
Attorneys for Appellees.

MARCUS L. BELL,
E. C. CRAIG,
C. S. WILLISTON,
ERWIN W. ROEMER,
Of Counsel.

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 12 1941
CHARLES ELMORE CROPLEY
CLERK

No. 577

In the Supreme Court of the United States

OCTOBER TERM, 1940

ARTHUR W. MITCHELL, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

BLANK PAGE

INDEX

	Page
OPINIONS	1
QUESTION PRESENTED	1
STATEMENT	2
PROCEEDINGS IN COURT BELOW	12
THE EVIDENCE	14
ARGUMENT	14
I. Appellant has failed to show that he has legal interest in the accommodations to be furnished in the future by the Rock Island on its train No. 45	14
II. The Commission's findings are fully supported by the evidence	23
III. Not all discriminations are unlawful under the Interstate Commerce Act but only those that are undue, unreasonable, or unjust. Whether a discrimination is undue, unreasonable, or unjust is a question of fact for the Commission	32
IV. The Commission's order contravenes no constitutional provision	38
V. Question of segregation is not here involved	40
VI. The question of the applicability of the Arkansas segregation statute to interstate passengers, and of its constitutionality if so applicable, is not necessarily presented for decision in this case	49
VII. Applicability of state segregation statute to interstate commerce	57
CONCLUSION	66

CASES CITED

Alabama & Vicksburg Ry. Co. v. *Morris*, 60 Sou. 11	60
Algoma Coal Co. v. *U. S.*, 11 F. Supp. 487	22
Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134	16
Atchison Ry. v. *Railroad Comm.*, 283 U. S. 380	37
Avent v. *United States*, 266 U. S. 127	16
C. & O. Ry. Co. v. *Kentucky*, 179 U. S. 388	49
Chiles v. *C. & O. R. Co.*, 218 U. S. 71	21, 51, 54
Cozart v. *Southern Ry. Co.*, 16 I. C. C. 226	48
Councill v. *Western & Atlantic R. R. Co.*, 1 I. C. C. 339	42, 55
Crosby v. *St. L.-S. F. Ry. Co.*, 112 I. C. C. 239	48, 56
Dayton-Goose Creek Ry. v. *U. S.*, 263 U. S. 456	37
Edward Hines Trustees v. *U. S.*, 263 U. S. 143	22
Edwards v. *N. C. & St. L. Ry. Co.*, 12 I. C. C. 247	29, 44
Evans v. *C. & O. Ry. Co.*, 92 I. C. C. 713	29, 56

	Page
Florida v. *U. S.*, 292 U. S. 1	8, 37
Gaines v. *Seaboard Air Line*, 16 I. C. C. 471	28, 45, 55
Hall v. DeCuir, 95 U. S. 485	53, 57
Harden v. *Pullman Co.*, 120 I. C. C. 359	48, 56
Hart v. *State*, 60 Atlantic 457	57
Heard v *Georgia R. Co.*, 1 I. C. C. 428; 3 I. C. C. 111	29, 41
Huff v. *Norfolk-S. R. Co.*, 88 S. E. 344	21
I. C. C. v. *Baird*, 194 U. S. 24, 25	21
I. C. C. v. *Chicago, R. I. & P. Ry.*, 218 U. S. 88	16
L. & N. R. Co. v. *Ohio Valley Tie Co.*, 242 U. S. 288	20
L., N. O. & T. R. Co. v. *Mississippi*, 133 U. S. 587	49
Manufacturers Ry. Co. v. *U. S.*, 246 U. S. 457	34
McCabe v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151	16, 49, 57
Moffat Tunnel League v. *U. S.*, 289 U. S. 113	18
Nashville Ry. v. *Tennessee*, 262 U. S. 318	34
New England Divisions Case, 261 U. S. 184	36
New York v. *U. S.*, 257 U. S. 591	39
Piedmont & Nor. Ry. v. *U. S.*, 280 U. S. 469	37
Pitts. & W. Va. Ry. v. *U. S.*, 281 U. S. 479	22
Plessy v. *Ferguson*, 163 U. S. 537	53, 54
Rochester Tel. Corp. v. *U. S.*, 307 U. S. 125	14
Smith v. *State*, 46 S. W. 566	59
Sou. Ry. Co. v. *Norton*, 73 Sou. 1	64
Sou. Ry. Co. v. *Primrose*, 73 Sou. 2	65
Sprunt v. *U. S.*, 281 U. S. 249	22
Texas v. *U. S.*, 292 U. S. 530	37
Tex. & P. Ry. Co. v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266	37
Tex. & Pac. Ry. v. *I. C. C.*, 162 U. S. 197	33
U. S. v. *Louisiana*, 290 U. S. 70	8, 36
U. S. v. *Merchants etc. Assn.*, 242 U. S. 178	22
U. S. v. *Trucking Co.*, 310 U. S. 344	35
W., B. & A. El. R. Co. v. *Waller*, 289 F. 569	21, 57
Wis. R. R. Com. v. *C., B. & Q. R. R.*, 257 U. S. 563	36

STATUTES CITED

Interstate Commerce Act:	
Section 1 (5)	7
Section 2	8
Section 3 (1)	8, 9
Section 6 (7)	8
Section 13 (4)	8
Section 15 (1)	9
Section 15a	39
Section 16 (1)	8, 20
Transportation Act, 1920	39
Arkansas separate coach law	2
Miscellaneous:	
H. R. 8821, 75th Cong., 3d Sess.	38
H. R. 182, 76th Cong., 1st Sess.	38
H. R. 112, 77th Cong., 1st Sess.	37

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 577

ARTHUR W. MITCHELL, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The court below rendered no opinion. The Commission's report, *Mitchell* v. *Chicago, R. I. & P. Ry. Co.* (R. 18–33), appears in 229 I. C. C. 703.

QUESTION PRESENTED

The question presented is whether the Commission committed error of law in dismissing appellant's complaint respecting accommodations for colored passengers traveling in Arkansas on train No. 45 of the Chicago, Rock Island & Pacific Rail-

way Company on through journeys from Chicago, Ill., to Hot Springs, Ark., and refusing, under the facts and circumstances shown, and upon a finding that the present accommodations are not unjustly discriminatory or otherwise violative of the Interstate Commerce Act, to enter an affirmative order for the future, as sought in the complaint.

STATEMENT

This is a direct appeal from a final decree (R. 53) of the court below dismissing appellant's petition (R. 1-40), seeking *inter alia* to set aside the Commission's order of dismissal (R. 34).

On September 2, 1937, appellant filed complaint with the Commission (R. 2–7), naming as defendants the Illinois Central Railway Company, the trustees of the Rock Island, and the Pullman Company, alleging, in effect, that defendants, in complying with an Arkansas statute requiring segregation of the races during transportation, do not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over the line of the Rock Island at first-class fares from Chicago, Ill., to Hot Springs, Ark., and that this results in unreasonable charges and unjust discrimination against, and undue prejudice to, colored passengers, in violation of sections 1 (5), 2, 3 (1), and 13 (4) of the Interstate Commerce Act.

It was further alleged that by reason of the facts stated defendants had violated the Fourteenth

Amendment, in that they denied complainant the equal protection of the laws.

The relief requested by the complaint was that the Commission, after due hearing and investigation, enter an order commanding defendants to cease and desist from the violations of the Act alleged and to establish and apply in the future to the transportation of persons between the origin and destination named, in lieu of the services and facilities then being furnished, such other services and facilities as the Commission should deem reasonable and just (R. 7). The complaint did not ask for an award of damages (R. 28).

There was a hearing (R. 66–213); briefs were filed; an examiner's proposed report was issued (R. 10–17), to which complainant filed exceptions (R. 260–279), and defendants filed reply (R. 214–219); the proceeding was orally argued before the Commission; and, on November 7, 1938, the Commission issued its report (R. 18–30), containing findings of fact and conclusions thereon. Its ultimate conclusion and finding was that the alleged violations of the Act had not been substantiated and that the complaint should, therefore, be dismissed. With the report an order was issued dismissing the complaint.

The Commission found that the case was built mainly on an unpleasant experience complainant had on his above-mentioned trip from Chicago to Hot Springs. "On the evening of April 20, 1937, he left Chicago for Hot Springs over the lines of

the Illinois Central Railroad Company to Memphis, Tenn., and the Rock Island beyond, traveling on a round-trip ticket he had purchased at 3 cents per mile from the initial carrier's ticket agent in Chicago. He had requested a bedroom on defendants' through Chicago-Hot Springs Pullman sleeping car, but, none being available, the ticket agent provided him with a compartment as far as Memphis in the sleeper destined to New Orleans, La. Just before the train reached Memphis, on the morning after leaving Chicago, he had a Pullman porter transfer him, together with his hand baggage and other personal effects, to the Chicago-Hot Springs sleeper then on the same train, but which was to leave Memphis at 8:30 a. m., on Rock Island train 45, and reach Hot Springs, 193 miles west, at 1:05 p. m., the same day. Space was available and the porter assigned him a particular seat in that car, for which he was to pay the established fare, 90 cents." (R. 21.)

"Shortly after leaving Memphis and crossing the Mississippi River into Arkansas the train conductor took up the Memphis-Hot Springs portion of his ticket, but refused to accept payment for the Pullman seat from Memphis and, in accordance with custom, compelled him, over his protest and finally under threat of arrest, to move into the car provided for colored passengers, in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of

cars or partitioned sections thereof providing 'equal, but separate and sufficient accommodations', for both races." (R. 21.)

"Later the conductor returned the portion of the ticket he had taken up and correctly advised complainant that he could get a refund on the basis of the coach fare of 2 cents per mile from Memphis. The refund was never claimed from defendants and is not here sought, but defendants stand ready to make it upon application." (R. 21.)

"Complainant has an action at law pending against defendants in the circuit court of Cook County, Ill., for damages incident to his transfer."[1] (R. 21–22.)

The pullman car contained 10 sections of berths and 2 drawing rooms.[2] "The use of one of the drawing rooms," the Commission found, "would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent seat fare being applicable. Occasionally they are used by colored passengers, but in this instance both drawing rooms were already occupied by white passengers." (R. 22.)

[1] Although there is no official information, it is our understanding that the case has not yet been tried.

[2] It appears from the evidence that ordinarily the Hot Springs sleeping car used in this train has a compartment in addition to two drawing rooms. Appellant so testified (R. 85). The Rock Island timetable, Ex. 4, p. 6, R. 207, so shows.

The colored passengers' coach was an old combination affair, divided by partitions into three main parts, one for colored smokers, one for white smokers, and one in the center for colored men and women. Complainant sat in the women's section. There was a toilet in each section, but only the one in the women's section was equipped for flushing and it was for the exclusive use of the colored women. The car was without washbasins, soap, towels, or running water, except in the women's section. Complainant testified that the car was filthy and foul smelling, but the testimony of defendants was to the contrary (R. 22–23).

In July 1937—about 3 months after complainant made his trip—the old combination coach was replaced by a new, all-steel, modern, air-conditioned coach. This coach is divided by a partition into two sections, one for colored and the other for white passengers; and it has comfortable seats. In each section there are washbasins, running hot and cold water, paper towels and drinking cups, and separate flush toilets for men and women (R. 23).

This coach, the Commission found, "is as fully desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fares." (R. 23.)

The Commission found that the demand of colored passengers for Pullman accommodations over the route in question is shown by the evidence to have been negligible over a period of many years.

"Only about 1 negro to 20 white passengers rides this train from and to points on the line between Memphis and Hot Springs, and there is hardly ever a demand from a colored passenger for Pullman accommodations. The conductor recalled about 10 or 12 instances in the past 32 years of his service on the train, wherein colored passengers who had entered Pullman cars were required by him to move into the colored passengers' coach. He estimated that the demand for Pullman accommodations did not amount to one per year. What demand there may have been at ticket offices does not appear." (R. 24.)

Upon the evidence the Commission concluded that "The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, but there are no dining-car nor observation-parlor car accommodations for the latter, and they cannot lawfully range through the train." (R. 24.)

Section 1 (5) of the Interstate Commerce Act (49 U. S. C., secs. 1–27) provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, . . ."

290014—41——2

The Commission found that there was no violation of this provision. There was no evidence bearing upon the subject of the reasonableness of the fares themselves. If a carrier collects a 3-cent fare and furnishes only 2-cent accommodations, he has violated section 6 (7) of the Act, which requires strict adherence to the published rates. The Commission is authorized by section 16 (1) to enter an order awarding reparation for any overcharge, but complainant did not request such an order, no doubt for the reason that none is necessary, since the carrier is willing to make refund of the overcharge of 1 cent a mile upon application and upon surrender of the portion of the ticket covering the transportation from Memphis to Hot Springs.[8]

Section 13 (4) inhibits unjust discrimination against interstate commerce growing out of the relation of intrastate rates to interstate rates. Cf. *U. S.* v. *Louisiana,* 290 U. S. 70; *Florida* v. *U. S.,* 292 U. S. 1. The Commission found that there was no violation of this section because no intrastate fares were involved.

Sections 2 and 3 (1) of the Act provide:

> "SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge,

[8] The trustees of the Rock Island, in their answer to appellant's petition filed in the Circuit Court of Cook County, Ill., made tender of the amount of the overcharge (R. 93).

demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever, or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Under section 15 (1) the Commission is authorized to enter an order for the future requiring the carrier to cease and desist from any violation of these sections whenever, after full hearing, it is of the opinion that they are violated. Respecting the allegations of violations of sections 2 and 3, the Commission found that there is no showing that colored passengers are treated differently from white passengers on their journeys from Chicago

to Memphis over the Illinois Central, and that apparently that road is in no way chargeable with discrimination; that there is no discrimination on the part of the Pullman Company, because it provides accomodations in the form of drawing rooms, which if not already occupied or reserved for someone else, are available for colored passengers west of Memphis at the seat fare of 90 cents; that it is not its duty to enforce the State law, but that in deciding the case on the facts presented it must recognize that under the State law defendants must segregate colored passengers; that in these circumstances the present colored passenger coach and the Pullman drawing rooms meet the requirements of the Act; and that, as there is comparatively little colored traffic, and no indication that there is likely to be such demand for dining-car and observation-parlor car accomodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice are plainly not unjust or undue; that only differences in treatment that are unjust or undue are unlawful and within the power of this Commission to condemn, remove and prevent; that therefore the complaint should be dismissed (R. 29–30).

It is plain from the report that the Commission, in reaching this conclusion, took into consideration that appellant was the sole complainant, without authorization to speak for anyone else; that his

complaint "mentions but a single incident of alleged discrimination and prejudice," i. e., the one described in the report "in which complainant was involved"; that the case was "built mainly on an unpleasant experience complainant had about 18 months ago"; that the Pullman car on Rock Island train No. 45 "contained 10 sections of berths and 2 compartment drawing rooms"; that the "use of one of the drawing rooms would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent seat fare being applicable"; that "there is hardly ever a demand from a colored passenger for Pullman accommodations"; that there is no discrimination against colored passengers by the Illinois Central or the Pullman Company; that the remaining defendant, the Rock Island, is in the hands of trustees in bankruptcy; that the journey over its road from Memphis to Hot Springs on its train No. 45 is a day-time run of only 4 hours, 35 minutes; that the running of two dining cars and separate parlor cars, or the construction of partitions in the present cars, would put this carrier to great expense and would also cause it loss of needed revenues, because of the extremely slight, almost nonexistent demand for such accommodations by colored passengers, and that there was no evidence whatsoever of any demand either by appellant or any other negro passengers for dining-car accomodations on this short

run, on which the train leaves at 8:30 a. m. and arrives at destination at 1:05 p. m. the same day.

There was no evidence before the Commission that complainant ever made a similar journey over the Rock Island, or that he was ever before a passenger on the Rock Island. Nor was there any evidence that complainant intends in the future to make a similar trip over the Rock Island.

There was no evidence before the Commission to support a finding of unjust discrimination against complainant respecting dining-car service. The evidence indicates that in Arkansas the Rock Island, in view of the segregation statute, excludes colored passengers from the dining car while white passengers are being served, but there was no evidence before the Commission that complainant desired dining-car service or any eating accommodations while the train was in Arkansas, or that he was denied separate eating accommodations substantially similar to those afforded white passengers.

There was no showing before the Commission and there is none here that complainant has been authorized by any other colored persons to complain on their behalf because of alleged discrimination against them.

PROCEEDINGS IN COURT BELOW

April 20, 1939, appellant filed petition in the court below (R. 1-40) praying that the Commission's order be set aside, annulled, and vacated, and

that a decree be entered granting to him the relief prayed for in his complaint to the Commission. Answers were filed (R. 41–52). May 27, 1940—more than a year after the filing of the petition—the case was brought up for hearing before a three-judge court (R. 220–258).

June 27, 1940, the court filed findings of fact and conclusions of law (R. 52–53). It found that the Commission's order was made after a full hearing; that the Commission's findings were all supported by substantial evidence, and are not erroneous; that the Commission's order is supported by the findings, is not contrary to law, and contravenes no provision of the Constitution; that the court is without jurisdiction to grant the relief sought, or any part thereof; and that the petition should be dismissed.

On the same day, the court issued its decree, dismissing the petition for lack of jurisdiction (R. 53). While there was no opinion by the court explaining its reasons for holding that it lacked jurisdiction to grant the relief sought, it would seem that the holding is based on two grounds: (1) The court was clearly without jurisdiction to grant the prayer of the petition that "a decree be entered granting to the plaintiff the relief prayed for in his complaint filed before the said Commission" (R. 40), inasmuch as the grant of such a prayer would require exercise by the court of administrative functions; (2) there was no showing by plaintiff of his need for the extraordinary remedies of equity.

THE EVIDENCE

At the hearing before the court there was introduced *inter alia* a certified copy of the evidence before the Commiss[redacted]221). This evidence, transmitted to this Court as an original exhibit (R. 63), has been printed in full (R. 66–213). Appellant, in his brief before this Court, at page 13 and elsewhere, refers to his own abstract of the evidence, which he has reproduced in the appendices to his brief here, pp. 19–50. His brief makes frequent reference to this abstract. To avoid misunderstanding, attention should be called to the fact that appellees have not agreed that such abstract is a full, true, and accurate abstract of the evidence.

ARGUMENT

I

Appellant has failed to show that he has legal interest in the accommodations to be furnished in the future by the Rock Island on its train No. 45

In *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, the Court, reexamining the "negative order" doctrine, noted that the prior decisions involving the doctrine fall into three categories, the third of which is: "Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person." (P. 130.) The order in question, neither compelling nor forbidding conduct on appel-

lant's part, or on the part of a third person, seems clearly to fall within the third category, in reference to which the Court said, p. 136: "The requisites of equity have of course to be satisfied, but by the conventional criteria. They were satisfied in the *Procter & Gamble* case, since the bill sought to avoid a multiplicity of suits." They are not satisfied in this case. For, although appellant complained of a practice alleged to be discriminatory, and prayed for an order for the future correcting the practice, he did not show that the practice would affect him in the future.

Appellant's case before the Commission related solely to the accommodations furnished to him on a single trip from Chicago to Hot Springs. He neither alleged nor submitted evidence to show that he will have occasion or intends to make a similar trip in the future. In these circumstances it would seem that recovery of damages, if any, sustained on his one trip would constitute complete relief. He has an action at law pending in the Circuit Court of Cook County, Ill., for such damages (R. 21–22).

The relief he sought before the Commission was a legislative order for the future commanding the carriers to cease discriminating against him and other colored passengers in respect of accommodations on Rock Island train No. 45. But he was not authorized to seek avoidance of discrimination against other colored passengers.

299014—41——3

As a litigant in judicial proceedings, appellant may urge only his own grievances. This Court has said several times that it "will not listen to a party who complains of a grievance which is not his." *I. C. C.* v. *Chicago, R. I. & P. Ry.*, 218 U. S. 88, 109 and cases cited; *Arkadelphia Co.* v. *St. L. S. W. Ry. Co.*, 249 U. S. 134, 149; *Avent* v. *U. S.*, 266 U. S. 127; *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151.

The *McCabe* case was a suit by five negro citizens of the State of Oklahoma against certain railway companies to restrain them from obeying the Oklahoma separate coach law. This Court held that none of the complainants had personally been refused accommodations equal to those afforded to others and that they did not have sufficient interest in the subject matter to enable them to maintain the suit. It said:

"The desire to obtain a sweeping injunction can not be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed." (P. 164.)

The bill contained "some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be a 'multiplicity of suits,' there being at

least 'fifty thousand persons of the negro race in the State of Oklahoma' who will be injured and deprived of their civil rights." "But," the Court held, "we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. There is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. [Citing cases.]"

Although appellant submitted no evidence of an intention to travel again to Hot Springs over the Rock Island, he did find occasion to make the following significant statement (R. 157):

> "EXAMINER DISQUE. You not only want a Pullman car, but you want another car, an observation car, put on there?
>
> MR. MITCHELL. I want dining car accommodations also.
>
> EXAMINER DISQUE. You want another observation car put on, and you cannot mix them in the same dining car, so you want another dining car put on there?
>
> MR. MITCHELL. Yes. If that is what they should do, under the law, let them pay the

> price, and give it to me. * * * If they have passed a law that works that hardship on them, we want to take advantage of it."

In *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113, the Court held that in a suit to set aside a Commission order plaintiff must show that he has, or represents others having, a legal right or interest that will be injuriously affected by the order; that appellant could not maintain the action because its interest was not a legal one. The Court observed that the Urgent Deficiencies Act "does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for the setting aside of an order. But it does require that the petition shall set forth 'the facts constituting petitioner's cause of action,' and by other provisions show that for failure so to do the suit shall be dismissed. *Id.*, section 45. Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be unjustly affected by the order. *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148. *Sprunt* v. *U. S.*, 281 U. S. 249, 254. *Pitts. & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, 486."

The Court further held: "Plaintiffs have failed to show that they are so qualified. Their interest . . . is no more than a sentiment, . . ." The interest of appellant here seems to be no more than a sentiment, since he has not shown he will have occasion to use the facilities of the Rock Island in the

future. He apparently seeks to champion the rights of negroes generally who may in the future use those facilities.

Appellant in argument before the court below stated:

> "As a matter of fact, I have been down to Hot Springs several times since this thing happened. Of course, I have not gone down there on the Rock Island Railroad. I have gone down on the Missouri Pacific, which is a little more liberal and where you can get accommodations and something to eat." (R. 255.)

This statement indicates an affirmative intention not to patronize the Rock Island again. It admits appellant's lack of interest in the alleged discriminatory practice of the Rock Island. It establishes that the future practice, whatever it is, will not affect him. It shows that he has no standing to invoke the extraordinary remedy of equity; that he needs no decree for the future to compel the Rock Island to cease discriminating against him. He is not authorized and has no standing to complain in behalf of others. He has a complete remedy at law for any damages sustained on the one trip he made over the Rock Island. That remedy he has invoked.

The evidence before the Commission related only to the practice of the three named defendants in respect to accommodations furnished on one train, particularly Rock Island train No. 45 from Memphis to Hot Springs, on which, in deference to the

Arkansas statute, the practice of segregating in Arkansas is followed. There was no evidence disclosing the practice of the Missouri Pacific or any other railroad, either in Arkansas or elsewhere.

There is nothing of record to show that appellant's pending court suit for damages is predicated upon an alleged violation of the Interstate Commerce Act which requires a preliminary administrative finding by the Commission. Appellant has not so alleged; he has made no suggestion to that effect to the Commission. The fact that such a suit is pending was divulged only because appellant desired to prove certain things by introducing copies of the defendant's answers in that suit. The answers themselves were not put in; by stipulation of counsel certain paragraphs were read into the record (R. 90–96). No copy of the declaration showing the basis of appellant's suit was introduced before the Commission. There is no showing that the suit involves an administrative question. The inferences are that it does not; for, if appellant sought damages for violation of any provision of the Interstate Commerce Act, it is reasonable to suppose he would have claimed them in his case before the Commission. The Commission is authorized to award full damages for any violation of the Act. Section 16 (1); *L. & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288.

The circumstances seem to indicate that appellant's action at law is based on alleged violation of

common law rights. Such suits have been maintained in several instances; in none was it held that an administrative determination by the Commission was necessary. *Chiles* v. *C. & O. R. Co.*, 218 U. S. 71; *W., B. & A. El. R. Co.* v. *Waller*, 289 F. 589; *Huff* v. *Norfolk-S. R. Co.*, 88 S. E. 344.

The defendants urged that the complaint was insufficient to raise any issue as to practice, since the complaint mentions but a single incident of alleged discrimination and prejudice, and that one incident does not amount to a practice. The Commission overruled this contention on the ground that the one incident was mentioned as representative of an alleged practice that was expected to continue (R. 20).

Section 13 (2), Interstate Commerce Act, provides that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Cf. *I. C. C.* v. *Baird*, 194 U. S. 25, 39.*

---

* In that case the complaint to the Commission was filed by William Randolph Hearst alleging that certain interstate freight rates on anthracite coal were unreasonable and otherwise violative of the Interstate Commerce Act. It appears from the opinion of the Circuit Court, 123 Fed. 969, that Hearst was not a shipper of anthracite coal and that his only interest in the rates attacked was that of "an individual who merely purchases merchandise, the price of which is advanced by reason of its including the cost of transportation from the place of production to the place of sale." Under the decision in that case, almost any member of the public would have the right to maintain proceedings before the Commission.

But the right of an individual or of an association or league to prosecute proceedings before the Commission does not in itself confer the right to maintain judicial proceedings to set aside the Commission's order and the corollary right to take a direct appeal to this Court. As stated in *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148, ". . . plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury actual or threatened." In *Pitts. & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, it was held that the "appellant had no standing to bring this suit . . . in the absence of resulting actual or threatened legal injury to it . . ."; that certain "vague speculative interests" were "clearly insufficient to give the Pittsburgh an independent standing in this suit." See also *Sprunt* v. *U. S.*, 281 U. S. 249, 256–257; *Algoma Coal Co.* v. *U. S.*, 11 F. Supp. 487, 495–496; *U. S.* v. *Merchants etc. Assn.*, 242 U. S. 178, 188.

Although appellant has affirmatively indicated an intention not to patronize the Rock Island again (R. 255), the speculation that he might nevertheless do so is clearly insufficient to give him standing to seek an order for the future respecting the Rock Island's practice. It is now approximately 4 years since appellant made his one trip. It seems clear

that the practice of the Rock Island has not affected appellant during that 4-year period, and evidently will not affect him in the future.

The following argument is submitted for consideration in the event the Court should find that appellant has standing to maintain the suit.

II

The Commission's findings are fully supported by the evidence

Appellant's brief (pp. 17, 37, 78) alleges in general terms that the Commission's findings are not supported by the evidence. But in the absence of specification it is unnecessary to review the evidence to show support for each of the findings. Reference to some of the evidence, however, seems desirable.

The evidence shows that drawing rooms and compartments in Pullman cars are available to colored passengers.—Appellant desired to travel in Pullman cars and to that end purchased a first-class railroad ticket, at 3 cents a mile (R. 70, 158). He endeavored to purchase a drawing room or bedroom in the through Hot Springs sleeper. But none was then available in that car, all having been previously taken by other passengers. Similar space was available in a New Orleans sleeper and appellant purchased a compartment in that car as far as Memphis (R. 70, 73).

As the train approached Memphis the next morning, appellant had the porter move him into a seat in the body of the Hot Springs sleeper (R. 71). This Pullman car is carried from Memphis to Hot Springs on Rock Island train No. 45.

Shortly after leaving Memphis the train crossed the Mississippi River into the State of Arkansas, en route to Hot Springs. When the Rock Island train conductor came in due course to collect appellant's ticket, appellant offered to purchase a seat in the Pullman (R. 81), for which the Pullman charge was 90 cents (R. 162). The conductor informed appellant he could not ride in the Pullman car, because of the Arkansas segregation law, unless there was a vacant compartment or drawing room (R. 85–86, 94, 130–131, 139, 147–148, 160). There was none (R. 131, 138), and appellant was compelled to move into the combination coach (R. 131–133).

The coach fare was 2 cents a mile. The conductor informed appellant that he was entitled to a refund of 1 cent a mile for the distance from Memphis to Hot Springs (R. 71, 81, 93, 131). Appellant has not surrendered the ticket for a refund, because he "thought it was worth more in a hearing like this than it would be to turn it in." (R. 71.) But he sought no order from the Commission directing payment of the overcharge.

Appellant was sold a 3-cent per mile ticket at Chicago through to Hot Springs because he re-

quested it, even though he had no parlor-car reservation beyond Memphis. His inability to secure a reservation in the Hot Springs sleeper was not because he is a colored man, but because of the lateness of his application. He testified: "During the day of the 20th I believe—or the 19th, I called the . . . ticket office and made a reservation for the trip." (R. 70.) He left on the 20th. Had he applied for reservations earlier he could no doubt have obtained the space he desired—a drawing room or compartment through to Hot Springs—and then, no doubt, the trouble he experienced would have been avoided.

The conductor in charge of Rock Island train No. 45 testified that colored passengers may not use the sleeping car (R. 160), that is, they are not permitted to ride in the body of a Pullman sleeping car in the State of Arkansas, because of the State segregation statute (R. 131, 138), but that they are permitted to ride in Pullman drawing-rooms and compartments, at the regular *seat* fare, if such accommodations are available (R. 138, 148–149). By "if available," he meant that if a colored person applies for a through Pullman ticket "he can get it, if it is not sold. They do not hold it, to wait and see if some white man is going to buy it. They will sell it to him." (R. 160.)

Although appellant testified that he was told by the conductor he could not ride in the Pullman

sleeping car in Arkansas because he was colored (R. 85), he later qualified his statement as follows:

> "Well, he said this; he said 'The law of Arkansas has made it a crime for a negro to ride in a car of that type, in the presence of white people'; and that they would have to ride in compartments, or in drawing rooms; that they couldn't ride in the car." (R. 85–86.)

The conductor further testified that if at the time of this transaction there had been a vacant compartment, or a vacant drawing room in that Pullman car, he would have put appellant in it (R. 138–140); that when he has a drawing room or a compartment available, he puts the colored passenger in it, leaving the door open fronting out on the aisle, and then the passenger pays only the seat fare, the same in amount that he would pay for a seat in the body of the car (R. 148–149).

On cross-examination the witness was asked: "Now, during the 32 years you said you worked over there they have never had any first-class accommodations for negroes available, have they?" (R. 159.) While the witness then answered in the negative, he obviously meant that negroes are not allowed to ride in the unsegregated part of a Pullman car, and immediately he corrected his answer, confirming his previous testimony that they can use the compartments in sleeping cars (R. 160).

It thus appears that there were first-class accommodations for negroes, that is, in the drawing

rooms or compartments of Pullman cars, at the regular seat fare, when they were available, and that they were equally as available to negroes as to white persons.

The Commission's finding that there is but little colored traffic is supported by the evidence.—The conductor testified that he found colored passengers occupying compartments and drawing rooms on his train once in a while (R. 138); as to how many colored passengers per year had applied to him for passage in a Pullman car on his train, he answered, "Well, it won't average one a year." (R. 140.) As to the proportion of colored to white passengers who customarily ride that train he stated: "Well, for the last year or so, we have had about—we have handled about 20 whites to one colored." He further stated that within his knowledge, one or two colored persons in the Pullman car per year would cover the amount of travel in those cars, and that the accommodations on that train devoted to colored people are adequate to care for the amount of travel of such people (R. 145); that in 32 years he had only 10 or 12 colored persons riding in Pullman cars, that one or two, about one per year, or something like that, had applied to him for accommodations (R. 137–138, 145, 168).

The examiner observed that the witness was "testifying only as to the passengers he sees in compartments or drawing rooms in Pullman cars; he is not testifying as to how many people offer themselves at ticket offices to buy tickets." (R. 139.) The wit-

ness did not know about the demand at ticket offices, but in the absence of evidence of a practice at ticket offices to refuse to sell to negroes space in Pullman compartments and drawing rooms when available, it seems reasonable to assume that negroes who applied for such space when available were sold it and that those who boarded the trains with such space were all who had seasonably applied for it at the ticket offices. As observed by the Commission in *Gaines* v. *Seaboard Air Line,* 16 I. C. C. 471, 475, the fact that colored people find it impossible to get Pullman reservations on a popular train within a few hours of the time of its departure "indicates absolutely nothing in the way of discrimination."

The absence of demand for Pullman accommodations by negroes is illustrated by the testimony of John J. Pullen, who, testifying in behalf of complainant (R. 115–121) stated that he is a retired physician, living in Chicago; that he had practiced in Arkansas, owns property in Hot Springs and Little Rock, and frequently makes trips down there; that he has had occasion to use the Rock Island in making trips from Chicago to Hot Springs, and that the coach accommodations for negroes are not as good as coach accommodations for whites. The last trip he made from Chicago to Hot Springs over the Rock Island was in September 1937, but he did not undertake to ride in the Pullman car. He bought his ticket intending to ride in a coach. Further, that he had never

ridden from Chicago to Hot Springs over that route in a Pullman car, and that he had never tried to do so (R. 120).

The evidence in the present case respecting the volume of colored passenger traffic is consistent with findings of the Commission in previous similar cases. For example, in *Gaines* v. *S. A. L., supra,* the Commission found: "The testimony is clear that colored travel is mainly for short distances, whether between intrastate or interstate points, and that the proportion of negro to white passengers on long journeys, such as make sleeping accommodations necessary is infinitesimal. . . . It is a matter of common observation that throughout the land, without regard to the section, to the local conditions, or to the local laws, the proportion of colored Pullman travel to white Pullman travel is infinitesimal in amount . . ." See also *Edwards* v. *N. C. & St. L. Ry. Co.,* 12 I. C. C. 247, 248; *Evans* v. *C. & O. Ry. Co.,* 92 I. C. C. 713; *Heard* v. *Georgia R. Co.,* 3 I. C. C. 111, 115.

The evidence shows that the compartments and drawing rooms in Pullman cars are ordinarily sufficient for the number of colored passengers who want to ride in Pullman cars.—The train conductor testified that, considering the number of colored persons who travel in Pullmans on his train, the drawing rooms and compartments are ordinarily adequate and sufficient to take care of all of those who desire Pullman accommodations; that there is "plenty of space for all we are handling." (R. 147.)

The witness affirmed that ordinarily he can accommodate the colored man who desires a drawing room or compartment; that ordinarily he can accommodate in a drawing room or a compartment the colored applicant for Pullman accommodations, and at the same time comply with the Arkansas law (R. 147–148).

There is no evidence that appellant was subjected to unjust discrimination in respect of dining-car service.—Although appellant testified at length (R. 70–96), he made no claim, and submitted no evidence, that he was subjected to discrimination in respect of dining-car service; he made no mention of the subject in his testimony. He did not divulge whether he was served with breakfast either in his compartment or in the dining car of the New Orleans train on which he rode from Chicago to Memphis. He did not testify that he desired to obtain either breakfast or luncheon on Rock Island train 45, or whether he preferred to wait for luncheon until after the train arrived at destination, at 1:05 p. m. He did not testify that the Rock Island refused to serve him either breakfast or luncheon.

The first mention made of the dining car was after appellant had left the stand. Then, appellant's counsel, in support of his objection to a certain question, made this statement (R. 145):

> "Well, but as first-class passengers, having paid the first-class fare, we contend that we can ride in the observation car, and in

the Pullman car, and in the dining car, and not up there in the Jim Crow car, which is only for coach passengers."

The appellant, when asked by the examiner: "You not only want a Pullman car, but you want another car, an observation car, put on there?" answered, speaking as counsel *pro se,* "I want dining-car accommodations also." (R. 157.)

While the conductor testified on cross-examination that colored passengers are not admitted into the dining car (R. 160), there was no testimony that negro passengers are denied the equivalent of dining-car service. If colored passengers are to be segregated, they may not be served at the same time with white passengers in the dining car. If, however, there is a demand for dining-car service by colored passengers—the record contains no evidence of such demand—it can easily be taken care of, as indicated by the Commission's report in *Gaines* v. *S. A. L., supra,* dealing with a complaint was brought by five colored men alleging *inter alia* that they were refused access to dining cars and thereby subjected to unjust discrimination. In holding that no unjust discrimination had been shown, the Commission found that the evidence was "clear that colored passengers do get the same service that is furnished the whites, the only discrimination made being in hours of service or the place of service. For instance, colored passengers are not served with meals in the dining car at the same time with white passengers, but in consideration of

the relative amount of long distance travel of the two races they are served on the third and last call. If the colored passenger does not desire to wait until the last call is made, he is, upon his request, served with the same food and with the same care at his seat either in the Pullman or in the ordinary coach, portable tables being used for this purpose."

In the absence of testimony upon the subject in the present case, it would seem reasonable to infer that the Rock Island would not refuse to sell meals to colored passengers, either in the dining car at a reasonable hour (segregated from white passengers) or at their seats either in the Pullman compartments or in the day coach. The mere showing that colored passengers are excluded from the dining car on the Rock Island in Arkansas, without a showing that they are denied the equivalent of dining-car service, does not establish unjust discrimination in violation of the Interstate Commerce Act.

III

Not all discriminations are unlawful under the Interstate Commerce Act but only those that are undue, unreasonable, or unjust. Whether a discrimination is undue, unreasonable, or unjust is a question of fact for the Commission

Sections 2 and 3 of the Interstate Commerce Act in broad terms prohibit "unjust discrimination" and "undue or unreasonable" prejudice. It is clear from their wording that these sections do not in absolute terms prohibit all discrimination or prej-

udice but only such discrimination as in "unjust" and prejudice that is "unreasonable" or "undue." Such has been the uniform holding of this Court. In *T. & P. Ry.* v. *I. C. C.*, 162 U. S. 197, it said that the principal purpose of the second section is to prevent *unjust* discrimination between shippers; "and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the Act, be regarded by the Commission." (P. 219.)

This statement, having relation to discrimination between shippers in rates for freight transportation, applies with equal force to alleged discrimination between passengers in the service performed or accommodations furnished under passenger fares.

The Court thereupon considered the third section, and after noting that it forbids any "undue or unreasonable" preference or advantage in favor of any person, etc., pointed out that "as there is nothing in the Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact." The Court said that "The mere circumstance that there is, in a given case, a preference

or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable." (Pp. 219–220.)

In *Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, the Court said: "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 . . . renders unlawful any '*undue or unreasonable*' preference or advantage, prejudice or disadvantage. . . . And in the first paragraph of amended section 15 . . . it is rates, regulations, or practices that in the opinion of the Commission are '*unjustly* discriminatory, or *unduly* preferential or prejudicial,' etc., to which the prohibition is to be applied. (P. 481; Court's italics.)

In *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, the Court said that every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory, because "such preference prevents absolute equality of treatment among all shippers or all travelers. But discrim-

ination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by sections 2 and 3) only that discrimination which is unreasonable, undue, or unjust. . . . Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case."

In *U. S.* v. *Trucking Co.*, 310 U. S. 344, the Court affirmed its prior holdings in this regard: "The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination."

The Court also affirmed prior holdings to the effect that particular problems of discrimination are to be considered and determined in the light of the national transportation problem and the policy of Congress to aid in the development of adequate national transportation. It said:

"The particular problem here involved is but a segment of the larger complicated national problem of rates with which the Commission must deal. As exemplified by this record, the Commission is 'in-

formed by experience' of years in its consideration of the relationship of forwarders to our national transportation system . . .

"The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest. Its order was the embodiment of the Commission's judgment that the proposed tariff was a discrimination prohibited by the Act. 'The judgment so exercised, being supported by ample evidence, is conclusive.' "

In determining appellant's case the Commission properly gave consideration to the national transportation policy, which has for its purpose the maintenance of adequate transportation service. It was within its power, and therefore not in excess of its authority, to decline to issue an order, operating indefinitely and permanently in the future, the effect of which would be to require the carrier to provide facilities which appellant has not shown he will ever use, at an expense widely disproportionate to the demand for such facilities, and the revenue to be derived therefrom, in the face of the undisputed evidence that negro passengers purchasing first-class tickets are seated in the drawing rooms of Pullman cars, at the regular seat fare, and that ordinarily such facilities are ample to take care of the colored demand. Cf. *Wis. R. R. Com.* v. *C., B. & Q. R. R.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189–190; *U. S.* v.

Louisiana, 290 U. S. 70, 75; *Dayton-Goose Creek Ry.* v. *U. S.,* 263 U. S. 456; *Texas* v. *U. S.,* 292 U. S. 530, 531; *Tex. & P. Ry. Co.* v. *G. C. & S. F. Ry. Co.,* 270 U. S. 266; *Piedmont & Nor. Ry.* v. *U. S.,* 280 U. S. 469; 286 U. S. 299; *Atchison Ry.* v. *Railroad Comm.,* 283 U. S. 380; *Florida* v. *U. S.,* 292 U. S. 1, 6–7.

The Interstate Commerce Act neither requires nor prohibits segregation. At the opening of the present session of Congress Mr. Mitchell introduced a bill [5] providing:

> "That the Transportation Act (U. S. C., title 49, sec. 3 (1)), be, and the same is hereby, amended by adding a subsection to be known as subsection (a), which shall read as follows:
>
> '(a) It shall be unlawful to segregate any persons traveling as interstate passengers on any carriers subject to the provisions of this Act, or in railroad stations, waiting rooms, rest rooms, lunch rooms, restaurants, dining cars, or in any other accommodations provided for passengers traveling interstate, on account of such passengers' race, color, or religion; and any such discrimination or attempted discrimination shall subject the offending carrier, its officers, agents, servants, and employees, to the penalties hereinafter provided for violations of this Act.' "

[5] H. R. 112, 77 Cong., 1st Sess., introduced January 3, 1941, and referred to the Committee on Interstate and Foreign Commerce.

Similar bills were introduced by Mr. Mitchell at the last session of Congress and at the one before that;* but Congress has not adopted the proposed amendment, although meanwhile it has given extended consideration to the transportation problem, and on September 18, 1940, enacted Transportation Act, 1940.

Appellant of course could not hope to accomplish in these proceedings before the Commission what he might conceivably accomplish by legislation in Congress. The evidence submitted to the Commission was very narrow in its scope. It did not disclose general conditions; it related almost entirely to one train of one railroad. The Commission obviously could not lawfully issue an order having general application, upon the narrow record before it.

The general question whether segregation is to be abolished in all sections of the country where it is now practiced—the South and the Southwest—would seem to be one appropriately for determination by Congress.

IV

The Commission's order contravenes no constitutional provision

It is alleged that the Commission's order and findings deny to appellant due process of law and equal protection of the laws, in violation of the

---

*H. R. 182, 76th Cong., 1st Sess., introduced January 3, 1939, and H. R. 8821, 75th Cong., 3d Sess.

Fourteenth Amendment. Since appellant was granted a full hearing by the Commission, which is admitted, there appears to be no basis for the allegation of denial of due process of law. Respecting the alleged denial of equal protection of the laws, it seems clear that the requirement of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws is not violated by a finding by the Commission, after full hearing, that an alleged discrimination is not violative of the Interstate Commerce Act. As previously shown, the Act does not require absolute equality but prohibits only discriminations which are unjust or undue. This provision is of general application. In *New York* v. *U. S.*, 257 U. S. 591, the Commission, finding that the passenger fares of 2 cents per mile applicable intrastate within the State of New York caused unjust discrimination against interstate commerce in their relation to interstate fares as increased by the Commission in 1920, in compliance with the requirements of Section 15a of the Interstate Commerce Act, added by Transportation Act, 1920, and to carry out the declared congressional purpose "to provide the people of the United States with adequate transportation," ordered the intrastate fares increased to the same basis as that applying interstate. It was alleged that the Commission's order was invalid because it enabled the New York Central to violate its contract with the State, and thereby impaired

the obligation of a contract in violation of Section 10, Article I, of the Federal Constitution. The State had a charter-contract with the railroad company by which the latter was bound not to charge more than 2 cents a mile for passenger carriage between Albany and Buffalo. This Court held: "That section provides that 'no *State* shall . . . pass any . . . law impairing the obligation of contracts,' and does not in terms restrict Congress or the United States." (P. 600–601; Court's italics.) Similarly the provisions of the Fourteenth Amendment do not in terms restrict Congress or the United States. Congress, in the exercise of its constitutional power to regulate interstate commerce, has not condemned all discrimination but has prohibited only that which is found by the Commission to be unjust or undue.

The constitutionality of the Arkansas statute is not here in issue, nor was that question in issue before the Commission, which as an administrative body is of course not authorized to determine the constitutionality of statutes.

V

Question of segregation is not here involved

The complaint to the Commission did not bring in issue the question of segregation. Its principal allegation was inequality of accommodations furnished. At the hearing before the Commission appellant, as counsel for himself, stated: "The ques-

tion of segregation is not involved. The law of the State of Arkansas, which has been put into the record here, provides that the passengers of the two races must be separated, but that the accommodations must be equal. Now, we are contending that a colored man is entitled to everything that a white man gets, who pays a similar fare, on these trains." (R. 156.)

In his exceptions to the examiner's proposed report, however, appellant expressed his opposition to segregation, as indicated by the following statement in the Commission's report: "At the hearing complainant stated that segregation was not involved and apparently for the purpose of this case he accepted it, regarding the Arkansas statute as requiring it in that State for all passengers, both interstate and intrastate. However, in his exceptions he opposed it as abominable and urges that the statute does not require it as to interstate passengers." (R. 27–28.)

But before the court below appellant affirmed his prior statement before the Commission that segregation is not involved, stating to the court: ". . . There is no question of segregation involved. We have not said to the railroad that it must let us ride together with the white people. I care as little about riding with white people as they care about riding w h me, but if I buy first-class passage to ride on the Rock Island or on any other railroad in the United States, under my constitu-

tional rights I am entitled to the same treatment as any man is entitled to regardless of color." (R. 227–228.)

The ultimate question before the Commission was whether an order should be issued for the future. The Commission decided that under all the facts and circumstances no such order should be issued in this case.

The general principles applicable in cases of this kind had been stated in previous Commission decisions. In *Councill* v. *W. & A. R. R. Co.*, 1 I. C. C. 339 (1887), the Commission said (p. 345):

"It is both the right and the duty of railroad companies to make such reasonable regulations as will secure order and promote the comfort of their passengers. It is a custom of the railroad companies in the States where the defendant's road is located, and in all the States where the colored population is considerable, to provide separate cars for the exclusive use of colored and of white people."

After referring to a decision of the Supreme Court of Pennsylvania declaring the separation of white and colored passengers in a public conveyance to be a subject of "sound regulation to secure order, promote comfort, preserve peace, and maintain the rights of both carriers and passengers," the Commission further said (p. 346):

"Public sentiment, wherever the colored population is large, sanctions and requires this separa-

tion of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or unjust preference in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both."

Councill, in his complaint to the Commission, alleged that defendant had subjected him to unreasonable prejudice and disadvantage in violation of the Act to regulate commerce, in that, because of his color, he was not allowed a seat in the day coach set aside for women and for men accompanied by women, while white passengers who had purchased tickets at the same price paid by complainant were allowed to ride in said car. He further alleged that several persons on the train, one holding a lantern, "without provocation, struck the complainant with it several blows, cut and bruised his face, and the three together forcibly ejected him from the car and compelled him to go into and occupy another car." The defendant railroad denied that the persons who ejected the complainant from the white car were its agents.

"But the right of the carrier to assign a white man to another car than the ladies' car, or a colored man to a car for his own race, takes nothing from the right of either to have accommodations sub-

stantially equal to those of other passengers paying the same fare. The complainant had paid the same fare with other 'first-class' passengers. It was no more than fair dealing and common honesty that he should have the security and conveniences of travel for which his money had been accepted."

The Commission, finding that the accommodations furnished in the separate car for colored passengers were not equal to those furnished in the other car, ordered the railroad "to cease and desist from subjecting colored passengers to undue and unreasonable prejudice and disadvantage in violation of section 3 of the Act to regulate commerce, and from furnishing to colored persons purchasing first-class tickets on its road accommodations which are not equally safe and comfortable with those furnished other first-class passengers."

Heard v. *Ga. R. R. Co.*, 1 I. C. C. 428, 3 I. C. C. 111, and *Edwards* v. *N., C. & St. L. R. Co.*, 12 I. C. C. 247, are to the same effect and in these cases corrective orders were issued. In the *Edwards* case, at page 249, the Commission said: "If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations should be provided for colored passengers of the same class. The principle that must govern is that carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects

the passenger to 'undue and unreasonable prejudice and disadvantage.'"

In *Gaines* v. *S. A. L. Ry.*, 16 I. C. C. 471 (1909), the Commission, speaking of the segregation laws, said: "Throughout the section of the country embraced in this complaint the laws of the several states provide for the separation of the white and black passengers in the trains. These laws, in so far as they provide merely for such separation of the races, have been upheld by the courts as reasonable police regulations designed for the comfort, peace, and happiness of the black people as well as of the white, and, when equal accommodations are furnished the two races, are not open to just criticism from anyone. Nor are these laws and customs fairly open to comparison with the laws of states or countries where there is no race question because of the inconsiderable number of the black race."

Further, the Commission said: "A careful examination of the record before us indicates that notwithstanding the legally correct attitude of the defendants and their responsible officials, including city and district passenger agents, the colored traveler is not welcomed by the average ticket seller or the average Pullman conductor when he applies for sleeping-car accommodations. This condition is due to many things, the chief among which may be stated as (1) the exceeding infrequency of the demand; (2) the fear of breaking state laws in acceding thereto; (3) the natural, if legally inex-

cusable, confusion of the lay mind with respect to state and federal laws and the rights, obligations, and penalties attaching thereto; and frequently (4) the manner of the making of the demand."

Certain portions of the record before it, the Commission said, seemed to indicate "that a *modus vivendi* may be arrived at if the colored travelers and the carriers' servants will approach the situation each with respect and consideration for the prejudices and difficulties of the other. For instance, it is a matter of general knowledge and is stipulated in the record 'that the so-called race riot which occurred in Atlanta in the year 1906, began on or about September 22, 1906, and continued for about three days, more or less.' Yet in view of the fact and the state of feeling it indicated, one of the witnesses for the complainants, with reference to an experience he had coming from Richmond, Va., probably at Hamlet, N. C., on the night of October 6, 1906, or immediately after those riots and while the newspapers were full of accounts of violence in Atlanta, testified as follows:

> 'He (the conductor) was walking up and down in front of it (the sleeping car), and I accosted him. I said, "You are the conductor?" He said, "I am." I said, "I would like to have a berth to Atlanta." "Well," he said, "I don't know about that." I paced up and down the car with him there and finally I confronted him, and I said, "Let me ask you one question." I said,

"Do you mean to tell me that you refuse to sell me a berth on this car?" He said, "I do not, but I don't want to." I said, "It isn't a question of what you want to do." I said, "I want a berth; I want to know right now what you are going to do." He said, "If I sell you a berth there will be trouble down the road." I said, "All right, sir, I will take care of the trouble; I will take the berth." I got on the car, and there was no trouble. Now, the point is this, and the general complaint of the colored people, as a rule, is the unfairness, the attempt on the part of railroad agents, servants, as they say, to make it hard for them to get just such things as they could pay for.'

"The point of what the conductor said might very well have been that, in view of what had recently occurred in Atlanta and of the state of public feeling there, he did not care to assume the responsibility for placing the colored traveler to Atlanta in that car."

The record was quite clear on one point, the Commission said: "That in compliance with the laws of Georgia and the sentiment there negroes are assigned to the drawing-room, or separate compartments, so far as possible even in interstate travel." The Commission thought it might be useful to quote a part of the testimony of the general passenger agent of the Southern Railway:

"If a negro man, a proper kind of a man, a man who is clean and respectable, will go

to our ticket office in Atlanta, and want a sleeping-car berth, and there are berths available, accommodations available, our agent would attend to him just the same as he would a white man; but when you ask whether or not he can go and get one just the same as a white man any time, that has no bearing on the case, because white men are getting berths and making reservations every day, whereas the application of a colored man is very infrequent, so infrequent that we undertake as far as we can to sell them a berth in a stateroom or drawing room, as you may choose to call it, which is superior, equal to if not superior, to the accommodations furnished in the body of the car. It is always my understanding that that is very much more satisfactory to the colored man, to be separated from the white people in a separate compartment, than to be mixed up there in the body of the car. I don't believe I know of a colored man that wants to ride on a sleeping car that would not prefer that; it gives him all of the privileges of privacy, and relieves him of any embarrassment, and is likewise more satisfactory to the white people."

The ultimate conclusion of the Commission was that "Undue discrimination or prejudice has not been shown in any of the particulars alleged, and the complaint must be dismissed."

See also *Cozart* v. *Sou. Ry. Co.*, 16 I. C. C. 226, *Crosby* v. *St. L.-S. F. Ry. Co.*, 112 I. C. C. 239, and *Harden* v. *Pullman Company*, 120 I. C. C. 359.

VI

The question of the applicability of the Arkansas segregation statute to interstate passengers, and of its constitutionality if so applicable, is not necessarily presented for decision in this case

Although there are statements in the Commission's report which if isolated seem to indicate the Commission decided that the Arkansas statute is applicable to interstate passengers, a reading of the report as a whole indicates the Commission did not attempt to decide that question; and we suggest that the report should be so interpreted. "At the hearing," the Commission said, "complainant stated that segregation was not involved and apparently for the purpose of this case he accepted it, regarding the Arkansas statute as requiring it in the State for all passengers, both interstate and intrastate. However, in his exceptions he opposes it as abominable and urges that the statute does not require it as to interstate passengers. The statute is general in its terms in that like the Mississippi and Kentucky statutes dealt wth by the Supreme Court [in *Louisville, N. O. & T. R. Co.* v. *Miss.*, 133 U. S. 587, and *C. & O. Ry Co.* v. *Kentucky*, 179 U. S. 388], it does not mention either intrastate or interstate passengers. These latter statutes, as already stated, were by State courts confined to intrastate passengers and the Supreme Court accepted these constructions as binding on it. Complainant also relies on the Supreme Court's conclusions in *McCabe* v. *A. T. & S. F. R.*

Co., supra [235 U. S. 151], to the effect that the Oklahoma statute had to be construed as applying only intrastate because there had been no construction to the contrary by the State court." (R. 27–28.)

"Be that as it may," the Commission said, "the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and, while it is not for us to construe the statute, we think, in view of its general terms, that, until further informed by judicial determination, defendants are justified, as a matter of self-protection, in assuming that it applies to interstate, as well as intrastate, traffic." (R. 28.)

It appears, therefore, that other statements in the report having references to the statute, including: "the statute sets up two distinct groups of passengers . . ." (R. 25), and ". . . we must recognize that under the State law defendants must segregate . . ." (R. 29), should be read in the light of the above-quoted discussion and particularly the definite statement "it is not for us to construe the statute." The Commission clearly recognized that the question whether the statute should be construed as applying to interstate traffic is a judicial question, involving important constitutional considerations, to be determined in appropriate court proceedings, and not by the administrative body.

"What we are here dealing with," the Commission added, "is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute." (R. 28.)

In support of the latter statement the report cited *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, in which, the Commission said, "dealing with coach passengers, the Supreme Court held that in a southern State a railroad has the right, by the establishment of appropriate rules and regulations, to require segregation, intrastate and interstate, aside from any statutory requirements, provided substantially the same accommodations are furnished for the two races. It said that railroad regulations respecting this matter were subject to the same tests of reasonableness as those enacted by legislative authority and that rules and regulations induced by the general sentiment of the community for which they are made and upon which they operate are not unreasonable." (R. 25.)

In that case Chiles, a colored man, bought a first-class ticket from Washington, D. C., to Lexington, Ky., over the C. & O. The train he took at Washington did not run through to Lexington and he changed to another train at Ashland, Ky., going into a car which, under the regulations of the carrier, was set apart exclusively for white persons. From this car he was required to remove to a car set apart exclusively for the transportation of col-

ored persons. He removed under protest and only after a police officer had been summoned by the carrier. Subsequently he brought action for damages in a State court, where the jury rendered a verdict against him. He appealed to the State Court of Appeals which affirmed the judgment, and the case was brought to this Court. In affirming the judgment, this Court considered the contention that Chiles was an interstate passenger and was entitled to a first-class passage, and that, therefore, the act of the carrier in causing him to be removed from the car at Ashland was a violation of his rights and subjected the carrier to damages. "The complaint of the action of the court," this Court said, "rests upon the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void. There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, but the Court of Appeals of the State put the statute out of consideration, declaring that it had no application to interstate trains, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations."

This Court further said it "must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad com-

pany and the distinction between state and interstate commerce we think is unimportant." It cited *Plessy* v. *Ferguson,* 163 U. S. 540, in which a statute of Louisiana which required railroad companies to provide separate accommodations for the white and colored races was considered. "The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the Court, which was by Mr. Justice Brown, reviewed prior cases, and not only sustained the law but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of the carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable."

The right of an interstate carrier to require segregation had been upheld in the much earlier decision in *Hall* v. *DeCuir,* 95 U. S. 485 (1877). In that case the Court passed on a Louisiana statute, which

required interstate carriers to give all passengers traveling within the State equal rights and privileges in all parts of the conveyance, without distinction on account of race or color.[7] The State Supreme Court had upheld an award of damages against the owner of a vessel who excluded colored passengers on account of their color from the cabin set apart for whites during the passage. This Court held that the statute was a regulation of interstate commerce and was void; that "Congressional inaction left Benson [the shipowner] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seem to him most for the interest of all concerned." Speaking of that case in *Chiles* v. *C. & O. Ry.*, 218 U. S. 71, 76, the Court said:

> "This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but on the contrary leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such

[7] That statute was enacted in 1869. Later, Louisiana enacted a segregation statute, the constitutionality of which was sustained in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

cannot depend upon a passenger being state or interstate. This also is manifest from the cited case. There, as we have seen, an interstate colored passenger was excluded from the privileges of the cabin set apart for white persons by a regulation of the carrier and where the colored passenger's right to be was attempted to be provided by a state statute. The statute was declared invalid, because it attempted to force a carrier to do the very thing which plaintiff in error complains was not done in the case at bar, to wit, permit him to ride in the place set apart for white passengers. In other words, the statute was struck down, because it interfered with the regulations of the carrier as to interstate passengers. This court commented on the case subsequently in *Louisville &c. Railway Company* v. *Mississippi,* 133 U. S. 587, 590, and said: 'Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race was a question of interstate commerce, and to be determined by Congress alone.' We have seen that it was decided in *Hall* v. *DeCuir* that the inaction of Congress was equivalent to the declaration that a carrier could by regulations separate colored and white interstate passengers."

Decisions of the Commission also recognize the right of interstate carriers to require segregation, *Council* v. *W. & A. R. R. Co.,* 1 I. C. C. 339, *Gaines*

v. *S. A. L. Ry,* 16 I. C. C. 471, *Crosby* v. *St. L.-S. F. Ry. Co.,* 112 I. C. C. 239, *Harden* v. *Pullman Company,* 120 I. C. C. 359; and these cases affirm what is a matter of common knowledge that the carriers follow the practice of segregation only in territory where State segregation laws are in force. For example, in *Evans* v. *C. & O. R. Co.,* 92 I. C. C. 713, the Commission pointed out that the defendant's line traverses the District of Columbia and the States of Virginia, West Virginia, Kentucky, Ohio, Indiana and Illinois, but requires segregation only in Virginia and Kentucky. The train there involved ran from Charleston, W. Va., to Cincinnati, Ohio, and the practice of the carrier was as follows: "When the train on which complainant was a passenger arrived at the West Virginia-Kentucky line, the porter passed through the train requesting all white passengers in the compartment to move back to the coaches and all colored passengers in the coaches to move forward to the compartment, at the same time posting a sign with the word 'colored' in the compartment and signs with the word 'white' in the coaches."

Under these decisions it seems clear that the carriers have the right to follow the practice and that they have followed it for over 50 years. In the present case, the Commission dealt with the practice of the Rock Island in Arkansas, in assumed compliance with the Arkansas statute, a practice which it could continue to follow even though the

determination were made authoritatively in this case that the statute had no application to interstate passengers.

In these circumstances it would seem that the question as to the applicability of the State statute to interstate passengers, and of its constitutionality is so applicable, is not necessarily presented for decision in this case.

The following discussion is submitted, however, in the event the Court deems this question to be one for decision.

VII

Applicability of State segregation statute to interstate commerce

It appears that this question has never been directly decided by this Court. In 1877, in *Hall* v. *DeCuir*, 95 U. S. 485, the Court found that a Louisiana reconstruction statute passed in 1869 forbidding segregation was unconstitutional as an attempted regulation of interstate commerce as applied to a steamboat operating in interstate commerce on the Mississippi River from New Orleans to Vicksburg, Miss. Most of the subsequent cases which have held State statutes requiring segregation to be inapplicable to interstate commerce, have followed *Hall* v. *DeCuir*. These cases include *McCabe* v. *A. T. & S. F. Ry. Co.*, 186 Fed. 966, 972 (affirmed 235 U. S. 151), *Hart* v. *State*, 60 Atlantic 457, 462 (Court of Appeals of Maryland), *W. B. & A. El. R. Co.* v. *Waller*, 289 F. 598 (D. C. Court of Appeals).

In *Hall* v. *DeCuir*, it was found that while the statute purported only to control the carrier when engaged within the State, it necessarily involved his conduct to some extent in the management of his business throughout his entire voyage. "His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to

passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate."

While, no doubt, the statute, as applied within the State, was within the police power of the State, yet it must be conceded that that statute forbidding segregation is different from one requiring segregation. A statute forbidding segregation is not one tending to promote the peace, comfort and protection of the passengers as is one requiring segregation.

The Supreme Court of Tennessee, in *Smith* v. *State,* 46 S. W. 566, said "It is easy to perceive how it might conduce to the comfort, health, or safety of persons traveling to be separated; but no reason of this kind can be found, nor any other of a police nature, for requiring that all should be crowded or mixed together." Speaking of the Tennessee segregation statute, which the Court held was applicable to all passengers within the State, whether interstate or intrastate, the Court held that it was a proper and reasonable exercise of the State police power. "It is entitled, if that

were material, 'An act to promote the comfort of passengers.' It may operate for this purpose, or to promote the safety of one or both, or to further the ends of good order. If it be true, as is sometimes said, that race prejudices exist here that make it uncomfortable or unsafe, or promotive of disorder, to mix the races in public conveyances, then both safety and good order are promoted, as well as comfort in their separation. The state is to judge of the necessity for such a regulation. Whether either or both should be uncomfortable, unsafe, or liable to the injury or annoyance of disorder by such intermixture in travel is not the question. The question is whether it, in fact, is so, or whether the state legislature reasonably deemed it so, and provided against the consequences."

In *Ala. & Vicks. Ry. Co.* v. *Morris,* 60 Sou. 11, the Supreme Court of Mississippi held that the Legislature, in passing the Mississippi segregation law, did not intend to limit the application of the statute to that portion of the train given over to the accommodation of intrastate passengers. "To so hold would be to disregard the reason which underlies this legislation. The Legislature, in the exercise of its power to police the highways of commerce running through the state, enacted the statute in question to promote the peace, comfort, and general welfare of the public. The statute was not enacted with any idea of discriminating against the members of either race; nor was it prompted by preju-

dice or passion, but with the knowledge that the enforced intermingling of the races would be distasteful to both races, would inevitably result in discomfort to both, and provoke and encourage conflicts endangering the peace and quiet of the commonwealth. . . .

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. . . .

"If we should hold that the statute is inapplicable to interstate travelers, it seems to us that necessarily it must be condemned altogether, as the theory upon which its wisdom and justice rests will thus be declared fanciful and without foundation in fact. If the peculiar conditions existing here demanded this legislation to conserve the peace of the state, and our lawmakers have so decided, the mere fact that the passenger is going out of the state, coming into the state from without, or traveling across the state, does not alter the complexion of affairs, nor render the danger less, should a negro or white man be required, against his will, to occupy a car with passengers of another race."

Since the decision in *Hall* v. *DeCuir* this Court has sustained the validity of many State statutes

enacted under the police power, which had the effect of regulating commerce within the State, both intrastate and interstate, in the absence of action by Congress. It would seem that the Arkansas segregation statute, if applied to all passengers within the State, would have no more effect upon interstate commerce than would many of the State statutes held valid by this Court.

That the Arkansas statute does not discriminate against interstate commerce is shown by the fact that in general terms it applies to "all railway companies carrying passengers in this State . . ." (R. 211.) That it does not put any appreciable burden upon interstate commerce under the facts of this case, is shown by the fact that the entire run of the train from Memphis to Hot Springs except for the first few minutes is in the State of Arkansas, that the carrier has voluntarily complied with the statute without contest, and that the clear indications are the carrier, in the interest of its own business, would require segregation on this train in the absence of the State statute. A carrier is dependent for its patronage upon the people in the communities it serves and if the sentiment is in favor of segregation the carrier is virtually compelled to enforce it; and obviously the carrier must provide for the comfort, peace, and safety of all its passengers both black and white.

Smith v. *State, supra,* was an indictment of a conductor of a Louisville & Nashville Railroad passenger train under the Tennessee segregation stat-

ute for unlawfully failing to assign certain negroes to the car used in his train for colored passengers and for permitting them to ride in the car assigned to white passengers. Convicted in the trial court, he appealed to the Supreme Court of Tennessee and contended that the act referred to was invalid as a regulation of interstate commerce. Distinguishing *Hall* v. *DeCuir,* 95 U. S. 485, the Court held that the Tennessee statute was a reasonable exercise of the police power, since it tended to promote the comfort of the people, and that, as applied both to intrastate and interstate travel was not an invalid regulation of interstate commerce. Congress had not acted upon the subject and, therefore, the State could enact such a statute in the exercise of its police power and apply it to all passengers within the State.

In *A. & V. Ry. Co.* v. *Morris, supra,* appellee procured a ticket which entitled her to passage on appellant's railway from Vicksburg to Meridian (both points within Mississippi), and from the latter place, over the line of connecting carriers, to the city of New York. In addition to the railway ticket, appellee purchased from the agent of appellant a sleeping-car ticket entitling her to a berth in the Pullman car attached to and forming a part of the train. When appellee boarded the train at Vicksburg, she discovered as her fellow passengers three men of the negro race, and protested to the employees of appellant on the train that either she or the negroes be assigned to an-

other coach. This demand was refused or ignored, and the appellee was forced, if she occupied a sleeper at all, to retire to her berth in the same car with the berths occupied by the negro passengers. She claimed to have suffered much distress of mind and body, the result of being forced to occupy the same sleeping apartments used by men of a different race, and recovered a judgment.

The Court stated that the question involved was whether a State segregation statute is an invasion of the national authority to regulate and control commerce between the States, should it be interpreted to mean that the statute applies to interstate travelers abroad trains forming a part of a chain of carriers engaged in the business of transporting passengers taken up within the State for carriage to a point without the State. The Court held that the legislature did not intend to limit the application of the statute to that portion of the train given over to the accommodation of intrastate passengers. Finding the verdict of the jury ($15,000) to be grossly excessive, the Court ruled that if appellee would remit all except $2,000 the case would be affirmed.

In *Sou. Ry. Co.* v. *Norton*, 73 Sou. 1 (Sup. Ct., Miss.), a judgment was obtained by the appellee, Mary Norton, for $1,000 against the railway company because of violation of the Mississippi segregation statute, under the following facts: "The appellee . . ., boarded . . . the 'Memphis Special'

train at Philadelphia, Pa., and traveled from that point to Memphis, Tenn., in a Pullman sleeping car. In the same Pullman car there was a negro passenger, who had boarded the train in New York and whose destination was Memphis, Tenn. The Court pointed out that a segregation statute is in force in every state through which the Southern Railway passes except Illinois and Indiana. It affirmed its prior holding "that the statute is a reasonable constitutional exercise of the police power of the state, and is valid, and applies to both intrastate and interstate passengers; that the statute was enacted to promote the peace, comfort, and general welfare of the public."

Sou. Ry. Co. v. *Primrose,* 73 Sou. 2, affirmed a judgment recovered by appellee, Carrie Primrose, for $1,000 under circumstances similar to those in the *Norton* case, *supra.*

The Commission evidently had in mind cases like these when it expressed the view that defendants are justified, as a matter of self-protection, in assuming that the Arkansas statute applies to interstate as well as intrastate traffic, until further informed by judicial determination.

Both *Smith* v. *State, supra,* and *A. & V. Ry. Co.* v. *Morris, supra,* were appealed to this Court by the carriers. Both appeals were dismissed on the motion of the carriers (21 Sup. Ct. 917, 45 L. Ed. 1256 (not in U. S. Reports); 234 U. S. 766). Why the carriers withdrew the cases after they were ap-

pealed to this Court does not appear. It is inferable, however, that they became satisfied with the decisions of the State Supreme Courts that the State segregation statutes applied to interstate commerce. At least, they decided not to contest those decisions.

CONCLUSION

The decree of the court below should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel.

J. STANLEY PAYNE,
Assistant Chief Counsel.

MARCH 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 21 1941
CHARLES ELMORE CROPLEY
CLERK

No. 577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

ARTHUR W. MITCHELL . . . . . Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET. AL.

BRIEF ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, AS AMICUS CURIAE

HUBERT MEREDITH,
Attorney General,

M. B. HOLIFIELD,
Assistant Attorney General.

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 577

ARTHUR W. MITCHELL . . . . . *Appellant,*

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

BRIEF ON BEHALF OF THE COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE

MAY IT PLEASE THE COURT:

Notwithstanding we have authorized the Attorney General of Alabama to sign our name to his brief herein, we wish to emphasize a point that occurs to us as being important. The harmonious relations of the white and colored people in the United States have until recent years been one for Southern people to solve.

It is true that in every part of our nation where assaults have been made upon white women by colored men or exceptionally brutal and inexcusable murders committed by either white or colored, there have been lynchings which under no circumstances should be tolerated.

Every person charged with crime is entitled to an open and fair trial in court before the inflicting of punishment or his or her innocence is vindicated. But we wish to call this Court's attention to the fact that no mass murder of innocent colored men has ever occurred in the Southern states such as did occur in Southern Illinois and on one of the mixed bathing beaches in Chicago a few years ago. In the Southern part of the United States there is more pure Anglo-Saxon blood than in any like territory in the world, and likewise, there are more pure blooded Negroes than in any like territory in the world except the continent of Africa.

In this same Southland, you will discover among the Negroes a greater degree of universal Christian culture, education, and economic independence than in all the rest of the world. To what can you attribute this marvelous progress of this race from slavery to the elevated position it now occupies? There can be but one answer: They have been permitted to develop cultural standards of their own, unhampered by an intermeddling and dominant race. They have their own churches, their own grammar and high schools, their own colleges and universities. Our steam railways furnish them separate coaches, leaving them free in their transportation from the critical inspection of other races who neither understand nor can sympathize with the advantages and disadvantages under which this race has made its marvelous progress in the last seventy-five years. They have their own public parks and places of amusement.

The reason for race prejudice and antagonism is that neither of the contacting races understands the motivating impulses of the other race. No one can do his best under the carping antagonistic criticism of others. Our best development is made where our efforts receive understandable and sympathetic criticism.

The Anglo-Saxon and the Negro of the South understand each other. Neither interferes with the cultural development or social affairs of the others. Southern white men glory in the achievements of Dr. Washington and Carver of Tuskegee, and Paul Laurence Dunbar of Dayton, Ohio. While the latter was born and educated in the North, his father and mother were Southerners.

On April 6, 1941, the author of this brief read on page 12 of column 4 of The Courier-Journal, Louisville, Kentucky, the following news item:

"White Man Refusing Seat to Negro Shot on Tram

"Assailant, Woman Escape

"A white man who wouldn't give part of his seat to a Negro woman was shot by a Negro man at 7:05 p. m. Saturday in a crowded street car on 2d near Breckinridge.

"The white man was identified from a union card in his pocket as Sam J. Belin, 65, of 1142 So. 2d, electrician at the Charlestown powder plant. He was admitted to the City Hospital in a critical condition, a bullet wound in his stomach.

"The Negro man and woman and a Negro man who accompanied them left the car, which stopped immediately.

"Witnesses said the Negroes entered the car together, Belin, a 200-pound man, sat alone on a seat near the front. A Negro man asked Belin to give part of his seat to the Negro woman.

"Belin was quoted as saying, 'I ain't giving no seat to a nigger.'

"Witnesses added that the woman slapped Belin, who then arose from his seat and moved toward the trio. One of the Negro men pulled an automatic pistol from his pocket and fired one bullet into Belin's stomach.

"Motorman Ernest Snyder, 45, of 2813 So. 3d, said he opened the doors automatically when he stopped the car. Passengers on the car made no attempt to stop the Negroes as they left.

"It was reported at Belin's address that he had been there only a week. His union card also gave an address of 570 Teasdale Road, the Bronx, New York."

This unfortunate tragedy would not have occurred if the State of Kentucky had required separate cars for white and colored passengers on its street railways as it does on its steam railways. The Northern white man and the Southern Negro did not understand either the motive or courage of the other. We need not less, but more of separation of the whites and colored.

The Federal Congress has wisely failed to legislate upon this problem in interstate transportation, leaving it to the wisdom of the respective states and the carriers. There is where this problem is being successfully solved and where it should remain.

Of the briefs that have been filed in this case and which we have been permitted to read, the brief for the Interstate Commerce Commission by the Honorable Daniel W. Knowlton and J. Stanley Payne has accurately presented the legal argument which the Commonwealth of Kentucky would have presented. We adopt that brief as our own and join them in the contention that the decree of the court below should be affirmed.

Respectfully submitted,

HUBERT MEREDITH
Attorney General of Kentucky

M. B. HOLIFIELD
Assistant Attorney General

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 21 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 977

ARTHUR V. MITCHELL,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
FRANK O. LOWDEN, ET AL.,
Appellees.

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR THE STATES AND COMMONWEALTHS OF ARKANSAS, ALABAMA, FLORIDA, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, TENNESSEE, TEXAS AND VIRGINIA, AMICI CURIAE.

JACK HOLT,
Attorney General of Arkansas.
THOMAS S. LAWSON,
Attorney General of Alabama.
J. TOM WATSON,
Attorney General of Florida.
ELLIS ARNALL,
Attorney General of Georgia.
HUBERT MEREDITH,
Attorney General of Kentucky.
EUGENE STANLEY,
Attorney General of Louisiana.
GREEK L. RICE,
Attorney General of Mississippi.
W. F. BARRY,
Solicitor General of Tennessee.
GERALD MANN,
Attorney General of Texas.
ABRAM P. STAPLES,
Attorney General of Virginia.
Attorneys for Amici Curiae.

SILAS C. GARRETT, III,
Assistant Attorney General of Alabama.
LEWIS W. PETTEWAY,
Assistant Attorney General of Florida.
LINTON S. JOHNSON,
Assistant Attorney General of Georgia.
Of Counsel.

BLANK PAGE

INDEX

SUBJECT INDEX

Page

Statement 1

Interest of Amici Curiae 4

The Review of an Order of the Interstate Commerce Commission by the Judiciary is Limited 11

The Federal Courts will not Enter a Sensitive Area of Social Policy unless no Alternative to its Adjudication is Open 12

The Questions of the Applicability of the Separate Coach Law of the State of Arkansas to Interstate Passengers, and of its Constitutionality, if Applied to Interstate Passengers, are not Properly Before the Court for Consideration and Determination in this Case 15

The Congress is the Proper Forum to which an Appeal to Abolish the Practice of Segregation Should be Made, as Appellant has Recognized 27

INDEX—Continued

Page

State Segregation Statutes do not Violate the Fourteenth Amendment 30

The Applicability of State Segregation Statutes to Interstate Commerce, and Their Constitutionality, if so Applicable 33

Conclusion 49

TABLE OF CASES CITED

Alabama & Vicksburg R. R. Co. v. Morris, 103 Miss. 511, 60 So. 11, writ of error dismissed on motion of plaintiff in error, 234 U. S. 766 ..... 34, 46

Arkansas Gas Co. v. Department, 304 U. S. 61 47

Chicago, Rock Island & Pacific R. Co. v. Arkansas, 219 U. S. 453 47

Chiles v. Chesapeake & Ohio Railway Company, 218 U. S. 71 22

Clason v. Indiana, 306 U. S. 439 47

Gong Lum v. Rice, 275 U. S. 78 30

Hall v. DeCuir, 95 U. S. 485 ..... 22, 34

INDEX—Continued

Page

Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381.....31

Maurer v. Hamilton, 309 U. S. 598.....47

McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151 48

Milk Board v. Eisenberg Co., 306 U. S. 346.....47

Plessy v. Ferguson, 163 U. S. 537.....6, 30, 31

Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, et al., v. The Pullman Company, Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Debtor, et al., 61 Sup. Ct., Advance Sheet No. 10, page 643, 85 L. Ed., Advance Sheet No. 9, page 580.....13

Rochester Telephone Corporation v. United States, 307 U. S. 125 11

St. L. I. M. & S. R. Co. v. Arkansas, 240 U. S. 518..47

Smith v. State, 100 Tenn. 494, 46 S.W. 566, writ of error dismissed on motion, 21 Sup Ct. 917, 45 L. Ed. 1256 .....40, 46

South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177.....47

Page

Southern Railway Company v. Norton, 112 Miss. 302, 73 So. 1 46

Southern Railway Company v. Primrose, 72 So. 2..46

United States v. Hutcheson, 61 Sup. Ct., Advance Sheet No. 8, page 463 31

Welch Co. v. New Hampshire, 306 U. S. 79..... 47

STATUTES CITED

Chapter 3743, Sections 1 and 2, Laws of Florida, 1887 5

Chapter 5893, Sections 1 and 3, Laws of Florida, 1909 5

Code of Alabama, 1923, Sections 9968-9969..... 5

Code of Georgia, 1933, Sections 18-205 - 18-210.... 5

Code of Mississippi, 1930, Section 6132..... 5

Dart's Louisiana General Statutes, Sections 8130-8132 5

Kentucky Statutes, Sections 795-798 5

Michie's Code of Virginia, 1936, Sections 3962-3969 5

INDEX—Continued

Page

Pope's Digest, Chapter XX, Sections 1190-1201.... 4

Texas Penal Code, as amended, Articles 1659-1660 5

Williams' Code of Tennessee, 1934, Sections 5518-5520 5

Other Authorities Cited

H. R. 8821 (1938) 27

H. R. 182 (1939) 28

H. R. 112 (1941) 28

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 577

ARTHUR W. MITCHELL,
Appellant,

Vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.,
Appellees.

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR AMICI CURIAE

This brief is filed in accordance with permission granted to the amici curiae by this Honorable Court on March 21, 1941.

STATEMENT

The appellant filed a complaint (R. 3-7) before the Interstate Commerce Commission, alleging that the appellees, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, trustees of the estate of the

Chicago, Rock Island & Pacific Railway Company, a corporation (hereinafter called the Rock Island), Illinois Central Railway Company, a corporation, and Pullman Company, a corporation, had subjected him to unjust discrimination and undue and unreasonable prejudice, and praying an order to require them in the future to cease and desist from violations of the Interstate Commerce Act, and to provide for colored persons holding tickets for first-class accommodations from Chicago, Illinois, to Hot Springs, Arkansas, such first-class services and facilities as they provide for white persons holding tickets for first-class accommodations from Chicago, Illinois, to Hot Springs, Arkansas, and such other and further order or orders as the Commission might consider proper in the premises (R. 7).

The complaint was set for hearing by the Interstate Commerce Commission before an examiner, at which hearing testimony was taken (R. 66-213). Thereafter, the examiner made his proposed report to the Commission (R. 10-17), to which the complainant filed exceptions (R. 259-279), in answer to which the defendant, Rock Island, filed a reply (R. 214-219). The cause then came before the full Commission for oral argument (R. 18), and the Commission filed its report (R. 18-33) and order thereon dismissing the complaint (R. 34). The complainant then filed a petition for rehearing and reargument, and the defendant, Rock Island, filed its reply thereto (R. 34), and the Commission entered its order denying said petition for rehearing and reargument (R. 34-35). Appellant then filed a

petition in the United States District Court for the Northern District of Illinois, Eastern Division (R. 1-40), praying that the order of the Interstate Commerce Commission be set aside, annulled, and vacated, as null and void; that a decree be entered granting to the plaintiff the relief prayed for in his complaint filed before the Interstate Commerce Commission; and for any and all other and further relief that to the Court seemed meet and just (R. 40). At a hearing before a three-judge court, evidence was taken and oral arguments were heard (R. 220-258). Thereafter, the Court made findings of fact and conclusions of law (R. 52-53), and entered a decree dismissing the complaint for lack of jurisdiction (R. 53), whereupon, the appellant was allowed an appeal to this Court (R. 61-62), and this Court noted probable jurisdiction on December 16, 1940.

The gist of the appellant's complaint before the Interstate Commerce Commission was that while he was traveling from Chicago, Illinois, to Hot Springs, Arkansas, April 20-21, 1937, on a first-class ticket, and on the morning of April 21, 1937, after the train on which he was then riding, a train of the Rock Island, had entered the State of Arkansas he was compelled by the conductor of the train, an employee of the Rock Island, to move from the seat which he was occupying in the Pullman car, and for which he offered to pay the established fare, to a second-class coach, of accommodations inferior to the first-class accommodations on the train, the action of the conductor having been taken pursuant to the practice of the Rock Island, claiming to act

under the Separate Coach Law of the State of Arkansas. Pope's Digest, Chapter XX, Sections 1190-1201.

INTEREST OF AMICI CURIAE

The amici curiae have no particular interest in whether or not the judgment appealed from is affirmed or reversed. We have no particular interest in whether or not the order of the Interstate Commerce Commission dismissing the appellant's complaint is set aside or allowed to stand. However, we are interested in seeing that the issues before the Court in this case are clarified, rather than confused. Specifically, we are interested in seeing that this case is disposed of without a consideration of the question of whether or not the Separate Coach Law of the State of Arkansas is applicable to interstate, as well as intrastate, passengers, and without a consideration of the question of whether or not said law, if applicable to both interstate and intrastate passengers, is unconstitutional as an unauthorized interference with, and burden upon, interstate commerce. We believe that these questions are not properly before the Court for consideration and determination in this cause, and will hereinafter give our reasons for this belief. Further, we desire to express our views of the law in regard to these questions, should this Court hold that they are properly before it for consideration and determination in this case. It is a matter of common knowledge that the States and Commonwealths of Alabama, Florida, Georgia, Kentucky, Louisiana, Mis-

sissippi, Tennessee, Texas and Virginia have segregation statutes similar to the Separate Coach Law of the State of Arkansas which would probably be affected by any decision which this Court might make in regard to either of the questions hereinabove stated.

Code of Alabama, 1923, Sections 9968-9969;
Chapter 3743, Sections 1 and 2, Laws of Floriday, 1887, and
Chapter 5893, Sections 1 and 3, Laws of Florida, 1909;
Code of Georgia, 1933, Sections 18-205--18-210;
Kentucky Statutes, Sections 795-798;
Dart's Louisiana General Statutes, Sections 8130-8132;
Code of Mississippi, 1930, Section 6132;
Williams' Code of Tennessee, 1934, Sections 5518-5520;
Texas Penal Code, as amended, Articles 1659-1660;
Michie's Code of Virginia, 1936, Sections 3962-3969.

We heartily agree with the following statement made by Mr. Hughes, of counsel for the Rock Island, at the hearing before the three-judge Court:

"Most cases involving this delicate subject of segregation go through the state courts in which the states interested themselves are heard.

"If this plaintiff thought the Arkansas statute was an infringement upon the 14th Amendment he might have proceeded in a court to enjoin its enforcement and there might have had a determination of his right under that amendment. He might have, if he thought that the state law of Arkansas requiring equal accommodations was being violated by the Rock Island or any other railroad, tested the question in an Arkansas State Court. The State Court of Arkansas has the determination as to what constitutes equal or unequal accommodations within the meaning of the Arkansas statute." (R. 250)

It is a matter of common knowledge, of which this Court takes judicial notice, that in the States and Commonwealths which are parties to this brief there reside large numbers of the members of both the white and colored races. These statutes, we respectfully submit, were enacted by the legislatures of these various States and Commonwealths, not for the purpose of discriminating against, harassing, oppressing, or imposing a burden upon the members of either race, but rather, for the benefit and protection of the members of both races. That this is so, and that these statutes were enacted because of an important occasion for the reasonable exercise of the police power which these States and Commonwealths possess, to accomplish this end, is supported by the language of Mr. Justice Brown, speaking for this Court, in the case of *Plessy v. Ferguson*, 163 U. S. 537, where such a statute was be-

fore the Court for consideration. We here quote from his opinion in that case as follows:

> "A statute which implies merely a legal distinction between the white and colored races —a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.
>
> * * * * *
>
> "The object of the amendment (Fourteenth) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power

even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

* * * * *

"It is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.

* * * * *

"In determining the question of reasonableness it (the legislature) is at liberty to act with reference to the established usages, customs and traditions of the people, and with a

view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms

of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

The foregoing language was used by this Court in 1896, in speaking of the conditions existing in the State of Louisiana at that time. However, we submit that it is as true of the conditions existing today in the States and Commonwealths which are parties to this brief as it was of conditions in Louisiana at the time it was used.

THE REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION BY THE JUDICIARY IS LIMITED.

While the order of the Interstate Commerce Commission under attack in this case is negative in form, since it is an order dismissing the complaint and refusing to issue the cease and desist order prayed for, yet this fact is immaterial as to the power of the judiciary to review the same. *Rochester Telephone Corporation v. United States*, 307 U. S. 125.

However, the review of an order of the Interstate Commerce Commission by the judiciary is strictly limited. Mr. Justice Frankfurter spoke to this question for the Court in the case of *Rochester Telephone Corporation v. United States*, supra, as follows:

> "From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open

to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n v. Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n v. Union Pacific R. Co.*, 222 U. S. 541."

The Interstate Commerce Commission, in its report, speaking of the Separate Coach Law of the State of Arkansas, stated: "It is not for us to construe the statute," (R. 28) and "It is not for us to enforce the State law. We understand that to be a matter for State authorities." (R. 29)

Consequently, it is submitted that, under the doctrine of limited judicial review of orders of the Interstate Commerce Commission, the question of the construction of the Separate Coach Law of the State of Arkansas as to its applicability to interstate passengers, and the question of its constitutionality, if so applicable, are not before the Court for consideration and determination in this cause.

THE FEDERAL COURTS WILL NOT ENTER A SENSITIVE AREA OF SOCIAL POLICY UNLESS NO ALTERNATIVE TO ITS ADJUDICATION IS OPEN.

We take it that it is elementary that the question of segregation of the races "touches a sensitive area of social policy."

In the very recent case of *Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, et al., v. The Pullman Company, Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Debtor, et al.*, 61 Sup. Ct., Advance Sheet No. 10, page 643, 85 L. Ed., Advance Sheet No. 9, page 580, such a question was before the Supreme Court. The proposition before the Court was the validity of an order of the Texas Railroad Commission which provided:

> "No sleeping car shall be operated on any line of railroad in the State of Texas * * * unless such cars are continuously in the charge of an employee * * * having the rank and position of Pullman conductor."

The Pullman porters, who were allowed to intervene in the cause, attacked the validity of the order mainly upon the ground that it was a discrimination against negroes in violation of the Fourteenth Amendment. Mr. Justice Frankfurter, after pointing out that it was well known that porters on Pullmans are colored and conductors are white, spoke for the Court as follows, in declining to consider the constitutional question raised by the Pullman porters:

> "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon

which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law."

The opinion then pointed out ways, under Texas law, by which a definitive ruling on the statutory power of the Texas Railroad Commission to make the order under attack could be had in the Texas courts; and concluded that, until such a definitive ruling was obtained, which definitive ruling might keep the constitutional issue from arising, it would not be considered and decided by the Court.

We submit that the identical situation is here presented. This proceeding can be disposed of, and, we respectfully submit, should be disposed of, by a determination of the following questions only:

1. Did the Interstate Commerce Commission, in making the order here under attack, exceed its constitutional power?

2. Did the Interstate Commerce Commission, in making the order here under attack, exceed its statutory authority?

3. Was there evidence before the Interstate Commerce Commission to sustain its order?

Likewise, if a definitive ruling on the question of whether or not the Separate Coach Law of the State of Arkansas is applicable to interstate, as well as intrastate, passengers is desired, there is no question but that the law of the State of Arkansas furnishes easy and ample means for securing the same.

Such a definitive ruling might keep the question of the constitutionality of the Separate Coach Law of Arkansas, if applied to interstate passengers, from arising. Consequently, it is earnestly submitted that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of the constitutionality of said law, if so applicable, should not be considered by this Court in this cause.

THE QUESTIONS OF THE APPLICABILITY OF THE SEPARATE COACH LAW OF THE STATE OF ARKANSAS TO INTERSTATE PASSENGERS, AND OF ITS CONSTITUTIONALITY, IF APPLIED TO INTERSTATE PASSENGERS, ARE NOT PROPERLY BEFORE THE COURT FOR CONSIDERATION AND DETERMINATION IN THIS CASE.

The complaint filed before the Interstate Commerce Commission did not raise either of these questions. The only references in the complaint to the Separate Coach Law of the State of Arkansas are the following:

"That the defendants, claiming to act under authority of the Arkansas Statute (Kirby's Arkansas Statute, Sections 6622 to 6632), did force and compel this complainant to ride in a second class car, notwithstanding the fact that complainant held a first class ticket;

* * * * *

"and said practice of the defendants in furnishing such unequal accommodations to persons holding similar first class tickets, under the aforesaid Statute, causes undue and unreasonable advantage and preference to white persons; and causes undue and unreasonable prejudice to this complainant and all other Colored persons who in the future will use, as interstate passengers, the lines of the said defendants." (R. 6)

and

"That the action of the defendants in operating under the Arkansas law causes undue and unreasonable preference to some persons and undue and unreasonable prejudice to complainant and other persons, in violation of Section 13 of the Interstate Commerce Act, and the Fourteenth Amendment of the United States Constitution in denying to petitioner equal protection of the laws." (R. 7)

It is seen that under the allegations of the complaint, itself, the appellant charges that the defen-

dants claimed to act under authority of the Separate Coach Law of the State of Arkansas, and, further, that it is the action and practice of the defendants, in purported compliance with said law, and not the law itself, which, according to the complaint before the Interstate Commerce Commission, allegedly caused undue and unreasonable prejudice to him, in violation of the Interstate Commerce Act and the Fourteenth Amendment of the United States Constitution.

That the questions of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and of its constitutionality, if so applicable, were not considered, even by the appellant, to be questions for consideration and determination is shown by the following statement which the appellant, as counsel for himself, made at the hearing before the examiner of the Interstate Commerce Commission:

> "The question of segregation is not involved. The law of the state of Arkansas, which has been put into the record here, provides that the passengers of the two races must be separated, but that the accommodations must be equal.
>
> "Now, we are contending that a colored man is entitled to everything that a white man gets, who pays a similar fare, on these trains." (R. 156)

Indeed, the Separate Coach Law of the State of Arkansas, was introduced in evidence at the hearing before the examiner of the Interstate Commerce Commission by the appellant, himself, apparently for the purpose of showing that he was entitled to equal accommodations under said statute (R. 125-127, 211-213).

That the examiner of the Interstate Commerce Commission considered that the appellant was not questioning the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, or attacking its constitutionality, if so applicable, in this proceeding, is shown by the following excerpt from his report:

> "For the purposes of this proceeding complainant accepts segregation under the Arkansas statute, but urges that defendants, to remove and avoid unjust discrimination and undue prejudice, are bound to provide the same equipment and accommodations for colored passengers as for white passengers." (R. 16)

It is true that, in his exceptions to the examiner's report, appellant denies that he accepted segregation under the Arkansas statute for the purposes of this proceeding (R. 260-261, 265). However, it is respectfully submitted that the statement hereinabove set out, which appellant made, as counsel for himself before the examiner, and the action of the appellant himself in introducing the Separate Coach

Law of the State of Arkansas in evidence, support the statement of the examiner in his proposed report, and refute the position taken by the appellant in his exceptions thereto.

That the Interstate Commerce Commission did not consider or decide either of these questions, which, indeed, it was without the power or authority to decide, we think is clear when all of the references to the Separate Coach Law of the State of Arkansas in the Commission's report are considered, rather than isolated statements in regard thereto contained therein. At the risk of tedium, we here set out, in the order in which they appear in the Commission's report, all of the references or statements made therein in regard to the Separate Coach Law of the State of Arkansas:

> "Shortly after leaving Memphis and crossing the Mississippi River into Arkansas the train conductor took up the Memphis-Hot Springs portion of his ticket, but refused to accept payment for the Pullman seat from Memphis, and in accordance with custom, compelled him, over his protest and finally under threat of arrest, to move into the car provided for colored passengers, in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections thereof providing 'equal, but separate and sufficient accommodations', for both races." (R. 21)

"The use of one of the drawing rooms would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent seat fare being applicable." (R. 22)

"The statute sets up two distinct groups of passengers, and the question for our determination is whether the circumstances and conditions surrounding these respective kinds of traffic are so substantially different as to justify the difference in treatment here alleged to be unlawful." (R. 25-26)

"At the hearing complainant stated that segregation was not involved and apparently for the purpose of this case he accepted it, regarding the Arkansas statute as requiring it in that State for all passengers, both interstate and intrastate. However, in his exceptions he opposes it as abominable and urges that the statute does not require it as to interstate passengers. The statute is general in its terms in that like the Mississippi and Kentucky statutes dealt with by the Supreme Court, it does not mention either intrastate or interstate passengers. These latter statutes, as already stated, were by State courts confined to intrastate passengers and the Supreme Court accepted those constructions as binding on it. Complainant also relies on the Supreme Court's conclusion in McCabe v. Atchison, T. & S. F. R. Co., supra,

to the effect that the Oklahoma statute had to be construed as applying only intrastate because there had been no construction to the contrary by the State court. Be that as it may, the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and while it is not for us to construe the statute, we think, in view of its general terms, that until further informed by judicial determination, defendants are justified, as a matter of self protection, in assuming that it applies to interstate, as well as intrastate, traffic. What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute." (R. 27-28)

"It is not for us to enforce the State law. We understand that to be a matter for State authorities. But in deciding the case on the facts presented we must recognize that under the State law defendants must segregate colored passengers." (R. 29)

Attention is particularly called to the statement in the report hereinabove quoted that "what we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute." It is respectfully submitted that the evidence before the Commission amply supports the Commission's statement that what it was dealing with was

"the practice of the carriers," rather than the Separate Coach Law of the State of Arkansas.

That the carriers might legally follow the practice of segregating the races in the absence of statute has long since been settled by this Court. *Hall v. DeCuir*, 95 U. S. 485; *Chiles v. Chesapeake & Ohio Railway Company*, 218 U. S. 71.

At the hearing before the three-judge district court, appellant also took the view that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, were not questions for consideration or determination, and the hearing before the Court proceeded on that basis. The appellant, as counsel for himself, stated, in response to a question from the Court as to what relief he asked of the Interstate Commerce Commission:

> "We asked a rule that the railroad be compelled to desist from its practice and to give those things to the colored people that the law of the State of Arkansas provides they shall have.
>
> "I wish the Court would remember that they enforce rigidly that part of the law which provides that they must travel separately. As a group who have to suffer the inconveniences of such a law, we contend that if you are going

to 'Jim Crow' us and put us off, then we are entitled to the benefits of the law that we at least ought to have equal accommodations. There is no question of segregation involved. We have not said to the railroad that it must let us ride together with the white people. I care as little about riding with white people as they care about riding with me, but if I buy first-class passage to ride on the Rock Island or on any other railroad in the United States, under my constitutional rights I am entitled to the same treatment as any man is entitled to regardless of color." (R. 227-228).

Other questions from the Court in regard to this matter, and appellant's answers thereto, were:

"The Court (Judge Woodward): What are the provisions of the statute?

"Mr. Mitchell: What I have recited, that they must travel separately, but that accommodations must be equal.

"The Court (Judge Woodward): Are you invoking the Arkansas statute?

"Mr. Mitchell: I am saying that I was traveling in interstate commerce as a passenger, and that the railroad had no right to discriminate against me because I went into that state. I also stated to the Commission

that the State of Arkansas was violating its own law. They have a law there providing for equal accommodations for negro passengers but they violated that law and they are violating that law. I asked the Commission to enforce that law but they refused to do so." (R. 227-228)

Further excerpts from the proceeding before the three-judge District Court touching on these questions are as follows:

"The Court (Judge Sparks): Do you contend the Arkansas law is not before us, then?

"Mr. Westbrooks: No, not as far as interference with interstate commerce is concerned. That question was brought up and we were therefore compelled to meet it by saying that even the Arkansas law provides for equal accommodations. All of the southern states where they have these separate-car laws, regardless of right or wrong or whether they are valid or invalid, provide for equal accommodations but our contention in this case is that this was an interstate journey and as such the state laws have no application." (R. 232)

"The Court (Judge Sparks): Do you agree that the Arkansas State law has nothing to do with this?

"Mr. Payne: I do not think so.

"The Court (Judge Sparks): They say so, so we will admit that.

"Mr. Payne: This is what the Commission found on that score.

"I would rather call your Honors' attention exactly to what the Commission held.

"Reading from the Commission's decision:

"'* * * Complainant also relies on the Supreme Court's conclusion in McCabe v. Atchison, T. & S. F. R. Co., Supra, to the effect that the Oklahoma statute had to be construed as applying only intrastate because there had been no construction to the contrary by the state court. Be that as it may, the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and while it is not for us to construe the statute, we think, in view of its general terms, that until further informed by judicial determination, defendants are justified, as a matter of self-protection, in assuming that it applies to interstate, as well as intrastate, traffic. What we are here dealing with is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute.'" (R. 242)

"Mr. Hughes: It was later, your Honors, when counsel was arguing, that the question arose as to whether the Arkansas statute was in or out. I think he said it was out.

"The Court (Judge Sparks): Mr. Westbrooks said that.

"Mr. Hughes: Yes.

"I am in a state of confusion as to whether it is in or is not." (R. 254)

In spite of the lengthy argument which appellant makes in his brief in regard to the Separate Coach Law of the State of Arkansas, both as to its applicability to interstate passengers, and as to its constitutionality, if so applicable, we respectfully submit that neither of those questions is before this Honorable Court for consideration or determination in this proceeding, for the following reasons:

1. Appellant, as pointed out hereinabove, at the hearing before the examiner of the Interstate Commerce Commission, stated that these questions were not involved, and the hearing before the examiner proceeded on that assumption.

2. This is a review of an order of the Interstate Commerce Commission, and, as pointed out above, the Commission stated in its report in support of its order that is was not for the Commission to construe

the statute, or to enforce it, and that what it was dealing with was not the statute, but the practice of the carriers.

3. As pointed out above, the appellant admitted at the hearing before the three-judge District Court that these questions were not involved, and the Court stated that it would be admitted that the Arkansas State Law had nothing to do with the proceeding.

THE CONGRESS IS THE PROPER FORUM TO WHICH AN APPEAL TO ABOLISH THE THE PRACTICE OF SEGREGATION SHOULD BE MADE, AS APPELLANT HAS RECOGNIZED.

If it is the purpose of the appellant to have the practice of segregation, whether under state law or carrier practice, declared unlawful, his appeal should be made to the National Congress, as it cannot be questioned that Congress, under the commerce clause of the Constitution, has power to make unlawful the segregation of interstate passengers, thereby occupying the field and dispossessing the states of such power as they now exert over the subject.

Indeed, the appellant himself seems to have recognized this fact. On January 5, 1938, Representative Mitchell, the appellant herein, introduced in the House of Representatives a bill, H. R. 8821, to amend the Transportation Act (U. S. C. title 49, sec. 3(1)) by adding the following:

"It shall be unlawful to segregate any persons traveling as interstate passengers on any carrier subject to the provisions of this Act, or in railroad stations, waiting rooms, rest rooms, lunch rooms, restaurants, dining cars, or in any other accommodations provided for passengers traveling interstate, on account of such passengers' race, color, or religion; and any such discrimination or attempted discrimination shall subject the offending carrier, its officers, agents, servants, and employes, to the penalties hereinafter provided for violations of this Act."

The bill was referred to the Committee on Interstate and Foreign commerce. It was never reported out.

On January 3, 1939, the Representative reintroduced the bill, H. R. 182, which was referred to the same committee. It was never reported out, although during the subsequent period the committee was engaged in studying and developing extensive revisions of the Interstate Commerce Act which were finally enacted and approved September 18, 1940, as the Transportation Act of 1940.

On January 3, 1941, the Representative introduced the same bill in the House of Representatives, and again it was referred to the Committee on Interstate and Foreign commerce. H. R. 112, 77th Congress, 1st Session.

The subject, therefore, is now before the Congress for disposition. Perhaps the complainant thus has his proposal of a national legislative policy before the proper forum, wherein the elected representatives from forty-eight States may determine whether the sovereignty exercised over the subject by approximately a quarter of the States is to be overruled by Federal action.

It is significant that, despite many years of agitation and repeated court decisions sustaining State policies of segregation, the Congress has not seen fit to enact legislation bearing directly on this controversial subject. Since this subject has been continuously before the National Congress for more than three years, and is still before that body, and it, the legislative arm of our Government, has not seen fit to enact legislation making the practice of segregation unlawful, we do not believe that the appellant may now be heard on this subject by this Court, the judicial arm of our Government, in a proceeding such as this.

We repeat our contention, and urge its consideration by this Honorable Court, that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, are not presented for consideration and determination in this cause. However, we submit the following discussion, which we ask to be considered, should this Court decide that these questions are before it for consideration and determination in this proceeding.

STATE SEGREGATION STATUTES DO NOT VIOLATE THE FOURTEENTH AMENDMENT.

That state segregation statutes do not violate the Fourteenth Amendment to the Constitution of the United States has been long since decided by this Court. *Plessy v. Ferguson*, supra.

This view has likewise been almost universally held by the lower Federal Courts and the State Courts, as evidenced by the numerous decisions of those Courts cited in the case of *Gong Lum v. Rice*, 275 U. S. 78.

In this connection, it is interesting to note the inconsistent positions in regard to the Fourteenth Amendment taken by the Solicitor General in his memorandum setting forth his reasons for declining to support the judgment of the three-judge District Court.

He first admits that state segregation statutes do not violate the Fourteenth Amendment. This admission, presumably, should suffice to remove the Fourteenth Amendment from consideration in this case, at least so far as the Solicitor General is concerned. However, he is compelled to admit, because of the numerous decisions of this Court to that effect, that if the Separate Coach Law of the State of Arkansas was enacted because of an important occasion for the exercise of the police power of Arkansas, then an interstate carrier would not be exempt therefrom. Then, in an effort to support his

contention that the Separate Coach Law of the State of Arkansas is unconstitutional, under the commerce clause, if applicable to interstate passengers, he reverses his field, and says that the Thirteenth, Fourteenth and Fifteenth Amendments must be considered; and, while admitting that they fall short of a prohibition against segregation, he contends that the "policy" enunciated in those Amendments against racial discrimination, must control the Court in its consideration and determination of the question of whether or not such statutes, if applicable to interstate passengers, are violative of the commerce clause.

In the first place, it might be well to observe that, as hereinabove pointed out, this Court has long since held (*Plessy v. Ferguson*, supra) that such statutes do not discriminate against either race.

In support of this novel, and, we submit, fallacious, reasoning, the Solicitor General cites the cases of *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, and *United States v. Hutcheson*, 61 Sup. Ct., Advance Sheet No. 8, page 463. We do not believe either of these decisions to be authority for such a contention.

In the first of those cases, the question before the Court was whether or not the Regional Agricultural Credit Corporation, created by the Reconstruction Finance Corporation, pursuant to statutory authority granted to it by the Congress, was

immune from suit. The Court, after pointing out that the statute creating the Reconstruction Finance Corporation made it amenable to suit, and that it was the policy of the Congress, in creating such corporations, to make them amenable to suit, as evidenced by some forty statutes creating such corporations, held that the provision of the statute which created the Reconstruction Finance Corporation, making it amenable to suit, extended to the Regional Agricultural Credit Corporation.

The question before the Court in the latter case was whether or not certain conventional, peaceful activities of a labor union in a labor dispute were in violation of the Sherman Law of 1890, as amended. The Court, in reaching the conclusion that such activities were not in violation of the Sherman Law, which is a statute dealing with labor disputes, that belongs to the body of the criminal law, held that the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932, also dealing with the subject of labor disputes, but which belonged to the body of the equity law, should be considered, and found that the effect of the latter statutes was to remove the sting of criminality from certain activities of unions in labor disputes which had prior thereto been made a violation of law by the Sherman Law.

As we read the opinions in these cases, they, in effect, amount to nothing more nor less than applications of the familiar principle of statutory construction that statutes dealing with the same general subject must be considered in pari materia in arriv-

ing at the intention of the law-making body. Certainly, it cannot be said that they support a contentention that, in considering whether or not a particular statute is in violation of the commerce clause of the Constitution, the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, which the statute admittedly does not controvert, should be considered, and that the statute should be held in violation of the commerce clause of the Constitution because of the so-called "policy" enunciated by those Amendments.

THE APPLICABILITY OF STATE SEGREGATION STATUTES TO INTERSTATE COMMERCE, AND THEIR CONSTITUTIONALITY, IF SO APPLICABLE.

It seems, as stated by the Solicitor General in his memorandum for the United States, and as stated in the brief for the Interstate Commerce Commission, that this Court has never decided the question of the applicability of state segregation statutes to interstate passengers, nor the question of the constitutionality of such statutes, if so applicable.

It is true, as stated in the memorandum of the Solicitor General, that the courts of six states have held, directly and indirectly, that such statutes are limited in their application to intrastate passengers, and that in those instances where such holdings of the state courts have been before this Court for review, this Court has, upon familiar principles, ac-

cepted the construction placed upon the state statutes by the state courts. However, as the Solicitor General said, "these decisions, it is true, do not represent an independent ruling on statutory construction; ordinarily the opinion proceeds under the compulsion of an assumed constitutional prohibition."

This assumed constitutional prohibition seems to have been rested mainly on the decision of this Court in *Hall v. DeCuir*, supra, which held invalid, as an unauthorized regulation of interstate commerce, an 1869 statute of the State of Louisiana which expressly prohibited common carriers in the State of Louisiana from segregating passengers on account of race or color.

However, the Supreme Courts of the States of Mississippi and Tennessee, in well reasoned opinions, where *Hall v. DeCuir*, supra, is considered and distinguished, have held that their state segregation statutes, similar to the Separate Coach Law of the State of Arkansas, are applicable to interstate, as well as intrastate, passengers, and that, as so applicable, they are constitutional. So cogent are the reasons given by the Supreme Courts of those two states in support of their conclusions, that we here quote in extenso from their opinions.

In *Alabama & Vicksburg R. R. Co. v. Morris*, 103 Miss. 511, 60 So. 11, in holding that the segregation statute of the State of Mississippi applied to interstate passengers, as well as intrastate passen-

gers, and that as so applied it was constitutional, the Court spoke as follows:

> "In *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, the court decided precisely the same question as was subsequently before the court in *Chiles v. Chesapeake & Ohio Ry. Co., supra.* There was this difference, however, in the facts of the two cases: The interstate carrier in the De Cuir case was a steamboat engaged in traffic on the waters of the Mississippi river, and was licensed to do a coasting trade, and registered under the laws of Congress of the United States. A negro interstate passenger demanded her rights, guaranteed by the laws of Louisiana, which reserved to negro passengers and to white passengers the privilege of being assigned to the same cabins on the boat. In that case the negro passenger declined to occupy cabins assigned to negroes. Preferring to associate with white folk, she asked to be put in the cabins occupied by persons of that race. There are, of course, persons who prefer to mingle with persons of a different race, even against the will of that race, but, happily, this class is negligible in number; but we find two of the class figuring in the decisions of the state and national courts.
>
> "In *Stone v. Yazoo, etc. R. R. Co.*, 62 Miss. 635 (52 Am. Rep. 193), commenting on the De Cuir case, CAMPBELL, C. J., made the following

observations: 'The statute of Louisiana requiring common carriers of passengers to give all persons traveling in that state, upon the public conveyance employed in such business, equal rights and privileges in all parts of the coyveyance, without discrimination or distinction on account of race or color, was held to be a regulation of commerce and void, even within the state, so far as it affected vessels plying the waters of the Mississippi river between different states. *The reason was the steamboat was enrolled and licensed under the laws of the United States and engaged as a regular packet between different states upon the navigable waters of the United States. The vessel was, in a sense, an institution of the United States, deriving its right to pursue its business from the United States and navigating the national highway common to all and not the property of private persons, or deriving its existence from a state. As Congress had regulated the business by providing for licensing vessels and leaving the license free and untrammeled as to the accommodations of passengers, and by the common law it pertains to the business of a common carrier to make reasonable and suitable regulations as regards passengers, it was held that Louisiana had no right to add a requirement not imposed by Congress, which in regulating the matter had left the common law in force as to this.*'

"It would serve no good purpose to review the several cases decided by the Supreme Court

of the United States, and cited in support of the contention of appellant, as we believe no case can be found decisive of the precise question raised in the instant case. The cases most nearly approaching the subject have been analyzed, and, in our opinion, none of them have pronounced a state statute, similar to our own, an invasion of the national authority to regulate and control commerce between the states, should it be interpreted to mean that the statute applies to interstate travelers aboard trains forming a part of a chain of carriers engaged in the business of transporting passengers taken up within the state for carriage to a point without the state. This is exactly the question involved in this case, and such a passenger is claiming damages because negro passengers were assigned to the same Pullman car to which she was assigned, and which she was compelled to occupy, or retire to one of the day coaches attached to the train; there being no sleeping car other than the one occupied by the negroes.

"We find ourselves unable to reach the conclusion that the legislature intended to limit the application of the statute to that portion of the train given over to the accommodation of intrastate passengers. To so hold would be to disregard the reason which underlies this legislation.

"The legislature, in the exercise of its power to police the highways of commerce running

through the state, enacted the statute in question to promote the peace, comfort, and general welfare of the public.

"The statute was not enacted with any idea of discriminating against the members of either race; nor was it prompted by prejudice or passion, but with the knowledge that the enforced intermingling of the races would be distasteful to both races, would inevitably result in discomfort to both, and provoke and encourage conflicts endangering the peace and quiet of the commonwealth.

"True the application of the statute to interstate trains necessarily imposes an additional expense upon the carrier. This carrier would be required to provide another Pullman, or to divide the one used into separate compartments; but it has been decided time and again that merely an additional expenditure of money will not render a statute so requiring susceptible to criticism.

"This statute has been upon our books for many years, and has caused no complaint or criticism from the inhabitants of the state. The two races here accept the law as a wise and necessary exercise of the police power of the state for the protection of members of both races. No greater punishment could be inflicted upon the average negro traveler than being

obliged to sit in the coach set apart for whites, and our colored fellow citizens would be the first to oppose a repeal of the statute.

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian —black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. Possessing the knowledge of local conditions common to all residents of our section, we confess some surprise that there was no sequel to the event described by the record.

"The ultimate settlement of the question rests with the Supreme Court of the United States; and, until that great court decides against the validity of the statute as construed by us, we feel impelled to adhere to our belief that the law is not only beyond criticism from a constitutional standpoint, but is also a reasonable and wise exercise of the police power of the state.

"One more observation: If we should hold that the statute is inapplicable to interstate travelers, it seems to us that necessarily it must be condemned altogether, as the theory upon which its wisdom and justice rests will thus be

declared fanciful and without foundation in fact. If the peculiar conditions existing here demanded this legislation to conserve the peace of the state, and our lawmakers have so decided, the mere fact that the passenger is going out of the state, coming into the state from without, or traveling across the state, does not alter the complexion of affairs, nor render the danger less, should a negro or white man be required, against his will, to occupy a car with passengers of another race.

"Each section of our common country has its own problems, and the laws of one state may not be necessary in another state; and that a law found to be necessary in our state should be assailed by a corporation created by the state may account for the amount of the verdict in this case. The statute in question, rather than burdening the carrier, is an aid to the peaceful operation of its business; and we have no doubt that its overthrow would create intolerable conditions, from which the railway company would be the first and greatest sufferer." (Emphasis supplied)

In the case of *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, the Supreme Court of Tennessee, in reaching the same conclusions as to the segregation statute of that state, as those reached by the Mississippi Court in the case just quoted from, said:

"It is admitted that the Act, so far as it operates to regulate commerce within the State, is valid, but it is urged that it is invalid as applied to the case of those passengers taken into the car without the State to be brought within or transported through it, as was the case in this instance, and it is urged that the question is so decided by the Supreme Court of the United States in the case of *Hall v. DeCuir*, 95 U. S. 485.

"If the contention of plaintiff in error as to the effect of this decision was correct, we would hold that decision conclusive and reverse the judgment, for we not only recognize the right of that Court to determine that question, but we regard its adjudications as always correct within its province, until reversed or changed by itself, and accord to them that unhesitating respect which is due the Supreme Court of the United States as our own highest Court for the settlement, and rightful settlement, of all questions which our Federal Constitution and laws submit to its judgment.

* * * * * *

"But we are of the opinion that the question here involved was not decided in the case referred to, and upon the aspect here presented, was not even considered.

"The question there was this: Under the Constitution of Louisiana all persons were given

equal rights and privileges upon any conveyance of a public character, and the Legislature of that State provided, substantially, that all persons should be carried together in public conveyances. A carrier engaged in interstate commerce under a regulation adopted for that purpose by itself, provided separate accommodations for white and colored passengers through that State and others adjacent. A colored passenger applied for transportation from New Orleans to Hermitage, both points within the State of Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought suit in the Eighth District Court for the Parish of New Orleans, under the Louisiana Act, to recover damages for her mental and physical sufferings. She obtained a judgment for $1,000. Defendant appealed to the Supreme Court of the State, and the judgment was affirmed. The case was carried to the Supreme Court of the United States, under Section 709 of the Revised Statutes. *That Court held that the law as construed by the State Court (which construction was conclusive upon Supreme Court of the United States) gave to all persons traveling in Louisiana upon public conveyances, though engaged in interstate commerce, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color, and deal with it, upon that aspect alone, as an effort to regulate interstate commerce by the State, and not as a police measure,*

which it was not, and in which aspect, therefore, was not considered. It was held to be a regulation of interstate commerce, and to be void, because such power was vested alone in Congress to be exercised, and whether it had done so or not, the State could not do it by such a law.

* * * * * *

"A requirement that all persons who travel shall travel together, is not in any sense a police regulation. It is easy to perceive how it might conduce to the comfort, health, or safety of persons traveling to be separated, but no reason of this kind can be found, nor any other of a police nature, for requiring that all should be crowded or mixed together. And, presumably, therefore, as it did not arise, no such question was made. It certainly was not considered or decided in that case.

* * * * * *

"As already said, it was not presented as a police regulation. It was not such, but was a regulation, pure and simple, of interstate commerce. It was not an Act passed in the exercise of a police power. It was based upon no such power, nor did it purport to be. The decision that it was, hence, not a valid law, was a matter of course.

"It remains only to consider whether it is a proper and reasonable exercise of the police power of the State, for, as was said in *Plessy v. Ferguson*, 'every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.'

* * * * * *

"It will be seen that the Act provides for separate accommodations, but for equal accommodations. It imposes no burden on either race, and gives to each the same privileges. Even in the matter of carrying nurses of another race, it gives to the colored passenger the same right to take a white nurse into the car for colored people that it does to the white passenger to take a colored nurse into that provided for white people. It is entitled, if that were material, 'An Act to promote the comfort of passengers.' It may operate for this purpose or to promote the safety of one or both, or to further the ends of good order. If it be true, as is sometimes said, that race prejudices exist here that make it uncomfortable or unsafe or promotive of disorder to mix the races in public conveyances, then both safety and good order are promoted as well as comfort, in their separation. The State is to judge of the necessity for such a regulation. Whether either or both should be uncomfortable, unsafe, or liable to the injury or annoyance of disorder by such inter-

mixture in travel, is not the question. The question is whether it in fact is so, or whether the State Legislature reasonably deemed it so and provided against the consequences. It is in these respects, therefore, entirely reasonable.

"No good reason can be perceived why such legislation is objectionable, or why it might not even be extended. If California, or any of the States of the West, should take a like view as to intermixture of their Chinese population with that of native or white people in public conveyances, it seems clear that, for the same reasons, they might enact the same laws, and, indeed, yet others for the separation of other races who might be hostile or prejudiced toward each other. The argument that it imposes unnecessary burdens on the carrier, to which so much weight was given in the DeCuir case, is not relevant, if it be a police regulation of a reasonable and proper character. The same argument was made, and on this ground repudiated, in the case of *R. Co. v. N. Y.*, 165 U. S., p. 628, and *Hennington v. Georgia*, 163 U. S., 299.

"We conclude, therefore, that the law is a reasonable police regulation, and applies to both intra and inter-state travel; that it is not invalid for any reason, or obnoxious to the Federal Constitution; that the question is an open one, under the decision of the Supreme Court of the United States, and that there is no reversible error in the judgment of the Court below." (Emphasis supplied.)

To like effect are the cases of *Southern Railway Company v. Norton*, 112 Miss. 302, 73 So. 1, and *Southern Railway Company v. Primrose*, 73 So. 2.

It is interesting to note that both *Alabama & Vicksburg R. R. Co. v. Morris*, supra, and *Smith v. State*, supra, were appealed to this Court by the carriers, but that the appeals were dismissed on their motions. 234 U. S. 766; 21 Sup. Ct. 917, 45 L. Ed. 1256. Of course, the reason for this action of the carriers after the cases were appealed to this Court is not known, but presumably they were satisfied with the correctness of the decisions of the State Supreme Courts.

We respectfully submit that these decisions are correct, that the reasoning on which they are based is sound, and that, should this Honorable Court decide that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, are before the Court for consideration and determination in this cause, then the views of those courts on these questions should be adopted.

This Court has repeatedly upheld the right of the states, under the police power, to legislate for the health, welfare, safety, peace and comfort of the people within its borders, even though such legislation incidentally affected, or even burdened or impeded, interstate commerce.

Chicago, Rock Island & Pacific R. Co. v. Arkansas, 219 U. S. 453;

St. L. I. M. & S. R. Co. v. Arkansas, 240 U. S. 518;

South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177;

Arkansas Gas Co. v. Department, 304 U. S. 61;

Welch Co. v. New Hampshire, 306 U. S. 79;

Milk Board v. Eisenberg Co., 306 U. S. 346;

Clason v. Indiana, 306 U. S. 439;

Maurer v. Hamilton, 309 U. S. 598.

Peculiarly pertinent, we think, to the instant situation is the following statement from the opinion of Mr. Justice Stone in the *Barnwell Bros.* case, supra:

> "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully

dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

Undoubtedly, the question of the segregation of the races "touches a sensitive area of social policy." We again submit that such statutes were enacted for the purpose of promoting the welfare, comfort, peace and safety of the people of both races. We believe that it is a matter of common knowledge, which this Court judicially knows, that in those States and Commonwealths which are parties to this brief, where large numbers of both races reside, such statutes do, in truth and in fact, promote the welfare, comfort, peace and safety of the people of both races.

The appellant lays great store by the dicta of this court in the case of *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151. However, it should be noted that all of the statements in the opinion of the Court in that case on which appellant relies are dicta, and that the only question decided in that case was one of equity procedure and jurisprudence.

CONCLUSION

We respectfully submit that the question of the applicability of the Separate Coach Law of the State of Arkansas to interstate passengers, and the question of its constitutionality, if so applicable, are not properly before the Court for consideration and determination in this cause. Further, we respectfully submit that since this cause can be disposed of without either "a tentative decision" on the construction of the statute, or "a premature constitutional adjudication;" and, since these questions touch " a sensitive area of social policy," this Court, "exercising a wise discretion," and "because of scrupulous regard for the rightful independence of the state governments" in the reasonable exercise of their police power in dealing with this highly important matter, should restrain its authority and stay its hands.

Finally, we respectfully submit that, should this Court find that these questions should be considered and determined in this cause, then the Separate

Coach Law of the State of Arkansas is applicable to interstate passengers, as well as intrastate passengers, and, as so applicable, is constitutional.

Respectfully submitted,

JACK HOLT,
Attorney General of Arkansas.

THOMAS S. LAWSON,
Attorney General of Alabama.

J. TOM WATSON,
Attorney General of Florida.

ELLIS ARNALL,
Attorney General of Georgia.

HUBERT MEREDITH,
Attorney General of Kentucky.

EUGENE STANLEY,
Attorney General of Louisiana.

GREEK L. RICE,
Attorney General of Mississippi.

W. F. BARRY,
Solicitor General of Tennessee.

GERALD MANN,
Attorney General of Texas.

ABRAM P. STAPLES,
Attorney General of Virginia.
Attorneys for Amici Curiae.

SILAS C. GARRETT, III,
Assistant Attorney General of Alabama.

LEWIS W. PETTEWAY,
Assistant Attorney General of Florida.

LINTON S. JOHNSON,
Assistant Attorney General of Georgia.
Of Counsel.

BLANK PAGE

BLANK PAGE

p. 6,

SUPREME COURT OF THE UNITED STATES.

No. 577.—October Term, 1940.

Arthur W. Mitchell, Appellant, *vs.* The United States of America, Interstate Commerce Commission, Frank O. Lowden, et al. } Appeal from the District Court of the United States for the Northern District of Illinois.

[April 28, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant, Arthur W. Mitchell, filed a complaint with the Interstate Commerce Commission alleging an unjust discrimination in the furnishing of accommodations to colored passengers on the line of the Chicago, Rock Island & Pacific Railway Company from Chicago to Hot Springs, Arkansas, in violation of the Interstate Commerce Act. The Commission dismissed the complaint (229 I. C. C. 703) and appellant brought this suit to set aside the Commission's order. Upon a hearing before three judges, the District Court found the facts as stated in the Commission's findings, and held that the latter were supported by substantial evidence and that the Commission's order was supported by its findings. The court then ruled that it was without jurisdiction, and its dismissal of the complaint was stated to be upon that ground. The case comes here on direct appeal. 28 U. S. C. 47a.

The following facts were found by the Commission: Appellant, a Negro resident of Chicago, and a member of the House of Representatives of the United States, left Chicago for Hot Springs on the evening of April 20, 1937, over the lines of the Illinois Central Railroad Company to Memphis, Tennessee, and the Rock Island beyond, traveling on a round-trip ticket he had purchased at three cents per mile. He had requested a bedroom on the Chicago-Hot Springs Pullman sleeping car but none being available he was provided with a compartment as far as Memphis in the sleeper destined to New Orleans. Just before the train reached Memphis, on the morning after leaving Chicago, he had a Pullman porter transfer him to the Chicago-Hot Springs sleeper on the same train.

Space was there available and the porter assigned him a particular seat in that car for which he was to pay the established fare of ninety cents. Shortly after leaving Memphis and crossing the Mississippi River into Arkansas, the train conductor took up the Memphis-Hot Springs portion of his ticket but refused to accept payment for the Pullman seat from Memphis and, in accordance with custom, compelled him over his protest and finally under threat of arrest to move into the car provided for colored passengers. This was in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of cars or partitioned sections providing "equal, but separate and sufficient accommodations" for both races. Later the conductor returned the portion of the ticket he had taken up and advised appellant that he could get a refund on the basis of the coach fare of two cents per mile from Memphis. That refund was not claimed from defendants and was not sought before the Commission, but it was found that the carriers stood ready to make it upon application. Appellant has an action at law pending against defendants in Cook County, Illinois, for damages incident to his transfer.

The Commission further found that the Pullman car contained ten sections of berths and two compartment drawing rooms; that the use of one of the drawing rooms would have amounted to segregation under the state law and ordinarily such combinations are available to colored passengers upon demand, the ninety cent fare being applicable. Occasionally they are used by colored passengers but in this instance both drawing rooms were already occupied by white passengers. The Pullman car was of modern design and had all the usual facilities and conveniences found in standard sleeping cars. It was air-conditioned, had hot and cold running water and separate flushable toilets for men and women. It was in excellent condition throughout. First-class white passengers had, in addition to the Pullman sleeper, the exclusive use of the train's only dining-car and only observation-parlor car, the latter having somewhat the same accommodations for day use as the Pullman car.

The coach for colored passengers, though of standard size and steel construction, was "an old combination affair", not air-conditioned, divided by partitions into three main parts, one for

colored smokers, one for white smokers and one in the center for colored men and women, known as the women's section, in which appellant sat. There was a toilet in each section but only the one in the women's section was equipped for flushing and it was for the exclusive use of colored women. The car was without wash basins, soap, towels or running water, except in the women's section. The Commission stated that, according to appellant, the car was "filthy and foul smelling", but that the testimony of defendants' witnesses was to the contrary.

The Commission found that in July, 1937, about three months after complainant's journey above mentioned, the old combination coach was replaced by a modern, all-steel, air-conditioned coach, which was divided by a partition into two sections, one for colored and the other for white passengers, and had comfortable seats. In each section there are wash basins, running hot and cold water, and separate flush toilets for men and women". This coach, the Commission said, was "as fully desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fares".

The Commission also found that the demand of colored passengers for Pullman accommodations over the route in question was shown to have been negligible for many years; that "only about one negro to twenty white passengers rides this train from and to points on the line between Memphis and Hot Springs", and there is hardly ever a demand from a colored passenger for Pullman accommodations. The conductor estimated that this demand did not amount to one per year. What demand there may have been at ticket offices did not appear.

The Commission's conclusion was thus stated: "The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, but there are no dining-car nor observation-parlor car accommodations for the latter, and they cannot lawfully range through the train".

The Commission, though treating the enforcement of the state law as a matter for state authorities, thought that in deciding the case on the facts presented it must recognize that the state law required the defendants to segregate colored passengers; that in these circumstances the present colored-passenger coach and the Pullman

drawing rooms met the requirements of the Act; and that as there was comparatively little colored traffic and no indication that there was likely to be such demand for dining-car and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice was "plainly not unjust or undue". The Commission observed that it was only differences in treatment of the latter character that were "unlawful and within the power of this Commission to condemn, remove and prevent".

From the dismissal of the complaint, five Commissioners dissented.

The United States as a party to this suit to set aside the Commissioner's order, and one of the appellees, does not support the judgment of the court below and has filed a memorandum stating its reasons. The Government concludes that the Commission erroneously supposed that the Arkansas Separate Coach Law applied to an interstate passenger and erroneously determined that the small number of colored passengers asking for first-class accommodations justified an occasional discrimination against them because of their race.

The other appellees—the Interstate Commerce Commission and the carriers—appear in support of the judgment.

First.—The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 143.

Nor is it determinative that it does not appear that appellant intends to make a similar railroad journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in

seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *General American Tank Car Co.* v. *El Dorado Terminal Co.*, 308 U. S. 422.

The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law.

Second.—The case was submitted to the District Court upon the evidence taken before the Commission. The undisputed facts showed conclusively that, having paid a first-class fare for the entire journey from Chicago to Hot Springs, and having offered to pay the proper charge for a seat which was available in the Pullman car for the trip from Memphis to Hot Springs, he was compelled, in accordance with custom, to leave that car and to ride in a second-class car and was thus denied the standard conveniences and privileges afforded to first-class passengers. This was manifestly a discrimination against him in the course of his interstate journey and admittedly that discrimination was based solely upon the fact that he was a Negro. The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation[1] but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment (*McCabe* v. *Atchison, T. & S. F. Rwy. Co.*, 235 U. S. 151, 160-162; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 344, 345) and in view of the nature of the right and of

[1] In this view, we have no occasion to consider the questions discussed by the Attorneys General of several States in their briefs as amici curiae.

our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust. In that aspect it could not be deemed to lie outside the purview of the sweeping prohibitions of the Interstate Commerce Act.

We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. *The Shreveport Case*, 234 U. S. 342, 356; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 749, 750; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 512, 513. Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever". 49 U. S. C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers. See *Council* v. *Western & Atlantic R. R. Co.*, 1 I. C. C. 339; *Heard* v. *Georgia R. R. Co.*, 1 I. C. C. 428; *Heard* v. *Georgia R. R. Co.*, 3 I. C. C. 111; *Edwards* v. *Nashville, C. & St. L. Rwy. Co.*, 12 I. C. C. 247; *Cozart* v. *Southern Rwy. Co.*, 16 I. C. C. 226; *Gaines* v. *Seaboard Air Line Rwy. Co.*, 16 I. C. C. 471; *Crosby* v. *St. Louis-San Francisco Rwy. Co.*, 112 U. S. 239.[2]

I.C.C.

Third.—We find no sound reason for the failure to apply this principle by holding the discrimination from which the appellant suffered to be unlawful and by forbidding it in the future.

[2] In Edwards v. Nashville, C. & St. L. Rwy. Co., 12 I. C. C. 247, 249, the principle was thus stated: "If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations shall be provided for colored passengers of the same class. The principle that must govern is that carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects the passenger to 'undue and unreasonable prejudice and disadvantage' ".

That there was but a single incident was not a justification of the treatment of the appellant. Moreover, the Commission thought it plain that "the incident was mentioned as representative of an alleged practice that was expected to continue". And the Commission found that the ejection of appellant from the Pullman car and the requirement that he should continue his journey in a second-class car was "in accordance with custom", that is, as we understand it, according to the custom which obtained in similar circumstances.

Nor does the change in the carrier's practice avail. That did not alter the discrimination to which appellant had been subjected, and as to the future the change was not adequate. It appears that since July, 1937, the carrier has put in service a coach for colored passengers which is of equal quality with that used by second-class white passengers. But, as the Government well observes, the question does not end with travel on second-class tickets. It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accomodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: "When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race". And the Commission has recognized that inequality persists with respect to certain other facilities such as dining-car and observation-parlor car accommodations.

We take it that the chief reason for the Commission's action was the "comparatively little colored traffic". But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a

similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe* v. *Atchison, Topeka & Santa Fe Rwy. Co., supra.* While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. *Id.* See, also *Missouri ex rel. Gaines* v. *Canada,* pp. 350, 351. And the Interstate Commerce Act expressly extends its prohibitions to the subjecting of "any particular person" to unreasonable discriminations.

On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act.

The decree of the District Court is reversed and the cause is remanded with directions to set aside the order of the Commission and to remand the case to the Commission for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.